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160-668

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~1034~~. 629

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

A CERTAIN TRACT OF LAND IN CUMBERLAND TOWNSHIP, ADAMS COUNTY, STATE OF PENNSYLVANIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 25, 1895.

(15918.)

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1 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America and a certain tract of land in Cumberland Township, Adams County, State of Pennsylvania, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 29th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] SAMUEL BELL,
Clerk of the Circuit Court of the United States,
Eastern District of Pennsylvania.

Allowed by—
GEO. M. DALLAS,
Cir. Judge.

April 29, 1895.

2 UNITED STATES OF AMERICA, ss.

The President of the United States, to a certain tract of land situate in Cumberland Township, Adams County, in the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Dallas, judge of the circuit court of the United States, this 29th day of April, in the year of our Lord, one thousand eight hundred and ninety-five.

GEO. M. DALLAS,
Cir. Judge.

3 Service accepted for the Gettysburg Electric Railway Company, the owner of the said tract of land, and respondent below. April 29th, 1895.

THOMAS HART, Jr., *Atty.*

On this 30 day of April, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Loyd J. Hunt, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Thomas Hart, esq., attorney for defendant, who accepted service of the writ as appears above.

LOYD J. HUNT,
Deputy U. S. Marshal.

Sworn to and subscribed the 30th April, A. D. 1895.

SAMUEL BELL,
U. S. Com's'r.

4 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.

THE UNITED STATES OF AMERICA, *vs.* A CERTAIN TRACT OF LAND, SITUATE IN Cumberland Township, Adams County, in the State of Pennsylvania.	No. 34.	April sessions, 1894.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1894, No. 34.

It is thus contained:

Be it remembered that on the eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-four, the United States of America, by Ellery P. Ingham, esq., its attorney for the eastern
5 district of Pennsylvania, comes into our court here and files its petition against a certain tract of land situate in Cumberland Township, Adams County, in the State of Pennsylvania, which, being read, is in the words and figures following, to wit:

6 In the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit.

THE UNITED STATES OF AMERICA,
vs.
A CERTAIN TRACT OF LAND, SITUATE IN Cumberland Township, Adams County, in the State of Pennsylvania.

To the honorable the judges of the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit:

The United States of America, by Ellery P. Ingham, esq., its attorney, comes and respectfully represents:

1. That by an act of Congress, approved August 1st, 1888, entitled "An act to authorize condemnation of land for sites of public buildings

and for other purposes," it is provided "That in every case in which the Secretary of the Treasury, or any other officer of the Government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

7

That section 2 of said act of Congress of August 1st, 1888, provides that—

"The practise, pleadings, forms, and modes of proceedings in causes arising under the provisions of this act shall conform as near as may be to the practise, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

2. That by an act of the general assembly of the State of Pennsylvania, approved June 8th, 1874, and entitled "An act providing a mode by which the title to all estates and interests in lands in the State of Pennsylvania may be vested in the United States when no agreement can be made with the owners of the same for the purchase thereof," it is provided "That if it shall so happen that the United States cannot agree for the purchase thereof with the owner or owners of any estate or interest in lands proposed to be taken as part of the premises which the United States are or may be authorized to acquire in this Commonwealth, for any public use or purpose whatever, it shall be lawful for the court of common pleas of the county in which said lands are situate, on application thereto by petition filed in behalf of the United States, after such notice to the owners of such estates and interests as the court shall direct, to appoint seven discreet and disinterested resident freeholders of the said county, who, having been duly qualified, and having given such public notice and such notice to the owners of the said estates or interests as the court may direct, shall estimate and determine the fair value of all and singular the estates or interests in the lands so proposed to be taken for the use of the United States as aforesaid, and shall designate the several owners thereof as far as the same can by them be reasonably ascertained, and shall report the same to the said court, and their award shall be subject to appeal, further proceedings, and confirmation; and upon confirmation of the report and payment of the sums of money so awarded to the parties severally entitled thereto, who shall have executed conveyances to the United States of their respective interests in the lands so taken, or in case of the disability, neglect, or refusal of any person or persons interested to make such conveyance, then upon payment into the court of the sums of money awarded such person or persons, respectively, the title to the lands and estates, or other interests therein thus paid for, shall become

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vested in fee in the United States, of which the conveyance from the said parties or an exemplification of the record of the said court in the premises shall be the proper and sufficient evidence: Provided, That where the lands proposed to be taken by the United States, as aforesaid, are situate within any town or city having more than ten thousand inhabitants, the viewers contemplated by this act shall be residents of such town or city.

3. That by an act of Congress of the United States of America, approved on the third day of March, A. D. 1893, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes," it is provided, inter alia, as follows: "Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets
8½ the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War."

4. That by a joint resolution of Congress, approved June 6th, 1894, entitled "Joint resolution, authorizing the purchase or condemnation of land in the vicinity of Gettysburg, Pennsylvania," it is provided as follows:

"Whereas Congress appropriated, by the act of March third, eighteen hundred and ninety-three, the sum of twenty-five thousand dollars to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading technical positions of both armies; and

"Whereas an appropriation for the further sum of fifty thousand dollars is now under consideration by Congress for like purposes, which has passed the House of Representatives during the present session and is now pending in the Senate; and

"Whereas it has been recently decided by the United States court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the War Department to execute the purposes declared in the act aforesaid; and
9 "Whereas there is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March third, eighteen hundred and ninety-three: Therefore, be it

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is authorized to acquire by purchase (or by condemnation) pursuant to the act

of August first, eighteen hundred and eighty-eight, such lands, or interest in lands, upon or in the vicinity of said battlefield as, in the judgment of the Secretary of War, may be necessary for the complete execution of the act of March third, eighteen hundred and ninety-three: Provided, that no obligation or liability upon the part of the Government shall be incurred under this resolution nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress."

5. That in order to carry out the purposes of the aforesaid act of March 3d, 1893, it is necessary that the United States acquire title in fee simple to a tract of land, situate in Cumberland Township, Adams County, Pennsylvania, now owned by the "Gettysburg Electric Railroad Company," which said tract of land is shown in the blue print hereto attached and made a part of this petition, and is described as follows:

Beginning at a point marked by an iron pin in the middle of the Wheatfield road, which point is S. 59° 57′ E. 1,187.7½ feet from an iron pin at the intersection of the Wheatfield road and the Emmitsburg road, said point being S. 74° 49′ E. 15 feet from a centre line of the Gettysburg Electric Railroad, produced N. 15° 11′ E.; thence by lands of the Gettysburg Battlefield Memorial Association S. 15° 11′ W. 872 feet; thence by lands of the Memorial Association S. 69° E. 24 feet to a point; thence still by lands of the Memorial Association S. 22° 20′ W. 108 feet to a white oak tree, being a corner; thence still by lands of the Memorial Association S. 32° E. 172 feet to a corner; thence still by lands of the Memorial Association S. 35° 40′ E. 200 feet to a corner stone; thence still along lands of the Memorial Association S. 21° 40′ W. 200 feet to a corner of lands of Rosanna E. Wible and the Memorial Association; thence by the lands of said Rosanna E. Wible S. 78° 1′ W. 50.3 feet to a point 15 feet at right angles from a point on the centre line of the Gettysburg Electric Railroad; thence by lands of said Rosanna E. Wible S. 11° 59′ E. 1,260 feet, parallel with and 15 feet distant at right angles from a centre line of said railroad, to a point on the dividing line between said Rosanna E. Wible and James W. Timbers; thence continuing by the same course S. 11° 59′ E. by lands of James W. Timbers and the United States, parallel with and 15 feet distant at right angles from a centre line of said railroad, 632 feet to a point; thence N. 78° 1′ E. 10 feet by lands of the United States to a point 25 feet distant at right angles from a point on the centre line of said railroad; thence still by lands of the United States S. 11° 59′ E. 120 feet, parallel with and 25 feet distant at right angles from a centre line of said railroad; thence still by lands of the United States, by a curve to the left concentric with and 25 feet distant on a radial line of said curve from a centre line of said railroad, 525 feet to a point; thence still by lands of the United States N. 62° E. 403 feet to a point 15 feet distant at right angles from a point on a centre line of said railroad; thence still by lands of the United States N. 40° 41′ E. 1,413 feet parallel with and 15 feet distant at right angles from a point on a centre line of said railroad to a point; thence by a curve to the right of about 490 feet radius concentric with and 15 feet distant on a radial line from the centre curved line of said railroad 400 feet to a point; thence by lands of the United States N. 87° E. 18 feet parallel with and 15 feet at right angles from a point on the centre line of said railroad to a corner of United States property

and Calvin P. Krise; thence along said boundary line S. 28° E. 16.5 feet to a point on a centre line of said railroad; thence continuing by the same course on said boundary line from said point in the centre of the said railroad S. 28° E. 29 feet to a corner of said Krise and the Gettysburg Battlefield Memorial Association; thence by lands of said Memorial Association S. 68½° W. 342 feet to a point; thence by lands of the Memorial Association S. 42½° W. 493 feet to a point 15 feet at right angles from a point on the centre line of said railroad; thence by lands of the said association S. 40° 41′ W. 141 feet parallel with and 15 feet at right angles from a centre line of said railroad to a point which is 5 feet southeast of a corner stone at a corner of the Memorial Association and W. H. Tipton's land; thence by lands of W. H. Tipton by the same course S. 40° 41′ W. 838 feet parallel with and 15 feet distant at right angles from a centre line of said railroad to a point; thence by lands of W. H. Tipton S. 49° 19′ E. 5 feet to a point 20 feet distant at right angles from a point on the centre line of said railroad; thence still by lands of said Tipton S. 40° 41′ W. 70 feet parallel with and 20 feet distant at right angles from a centre line of said railroad; thence still by lands of W. H. Tipton and the United States by a curve to the right concentric with and 20 feet distant on a radial line from a centre line of said railroad 528 feet to a point at the crossing of Plum Run; thence by lands of J. W. Timbers continuing by the same curved line concentric with the curved centre line of the said railroad, and 20 feet from it on a radial line, 425 feet to a point; thence N. 11° 59′ W. still by lands of James W. Timbers 120 feet to a point 20 feet at right angles from a point on a centre line of said railroad; thence by same lands N. 78° 1′ E. 5 feet to a point 15 feet at right angles from a point on the centre line of said railroad; thence by lands of
11 J. W. Timbers and Rosanna E. Wible N. 11° 59′ W. parallel with and 15 feet distant at right angles from a centre line of said railroad
2,318 feet to a point; thence by lands of said Rosanna E. Wible and by curve to the right concentric with and 15 feet distant on a radial line of said railroad 177 feet to a point; thence still by lands of Rosanna E. Wible N. 15° 11′ E. parallel with and 15 feet distant at right angles from a centre line of said railroad 761.5 feet to a point; thence still by lands of the said Rosanna E. Wible by a curve to the left concentric with and 15 feet distant on a radial line from the centre line of said railroad 177 feet to a point; thence by lands of the said railroad N. 15° E. 15 feet to a point in the middle of the said railroad; thence by the same course 30 feet to the middle of the said Wheatfield road; thence S. 59° 57′ E. 125 feet to the place of beginning. Containing 7 2-100 acres.

6. That the said tract of land hereinbefore described includes many important tactical positions occupied by numerous different commands and bodies of troops while actively engaged in the battle of Gettysburg at some of its most critical periods. That if title to the said tract be not vested in the United States it will be impossible to carry out effectually upon this part of the battlefield the purposes expressed in the said act of Congress, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," as will appear from the blue prints annexed hereto.

7. That on the day of June, 1894, the Secretary of War, in accordance with the provisions of the act of Congress approved August 1st, 1888, made an application to the Attorney-General to cause
12 proceedings to be instituted for the condemnation of the said tract of land. Whereupon the Attorney-General, upon the day of June, 1894, instructed the United States attorney for the eastern district of Pennsylvania to institute proceedings on behalf of the United States to condemn the said tract.

8. That no agreement can be made with the owners of the said tract for the purchase thereof.

9. That the Gettysburg Electric Railroad Company own and claims to own, or have some interest in or title to, the land and property hereinbefore described and proposed to be taken by condemnation by judicial process by the United States. Wherefore, the said attorney of the United States, on behalf of the said United States, prays that your honorable court will appoint a jury, according to law, to estimate and determine the fair value of all and singular the estates or interests in the property so proposed to be taken for the use of the said United States as aforesaid, and designate the several owners thereof, as far as the same can be by them reasonably ascertained, and report the same to the court, and that upon the payment into the court or to the proper owners thereof of the amount assessed and ascertained as the value of the parcel of ground and property above described as aforesaid as the interest of the said parties therein, that the possession be awarded by this court to the United States, and that the absolute title to said property be and thereby rest in the said United States for the purposes aforesaid; and that the court will divide the sum so paid and order its distribution among the several claimants according to their respective rights herein.

And your petitioner further prays for such other and further order as may be proper in proceedings for the appropriation of private
13 property to the public use aforesaid and as may be necessary to enable the said United States of America to acquire the property heretofore described.

(Signed) ELLERY P. INGHAM,
United States Attorney.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Ellery P. Ingham, United States attorney for the eastern district of Pennsylvania, being duly sworn according to law, doth depose and say that the facts hereinbefore set forth in the foregoing petition are true to the best of his knowledge and belief.

(Signed) ELLERY P. INGHAM,
United States Attorney.

Sworn and subscribed to before me, this day of June, A. D. 1894.

SAMUEL BELL,
United States Commissioner.

14 (Endorsed:) In the circuit court for the eastern district of Pennsylvania, third circuit. Of October sessions, 1894. No. —. The United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. Petition of Ellery P. Ingham, United States attorney.

15 *Answer of the Gettysburg Electric Railway Company.*

In the circuit court of the United States for the eastern district of Pennsylvania.

UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	April sessions, 1894. No. 34.

The answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, answering the said petition, says:

I. That it, the Gettysburg Electric Railway Company, is a corporation existing under the laws of Pennsylvania, formed by articles of association, filed July 28th, 1891, under the act approved May 14th, 1889, providing for the incorporation and government of street railway companies.

By the fourth section of the said articles the streets and highways upon which the said railway is laid and constructed, and the circuit of the route, are as follows: From a point on Carlisle street, Gettysburg, Adams County, Pennsylvania, at the intersection of Railroad street; thence southwardly on said Carlisle street through Centre Square and upon and along Baltimore street and Baltimore pike to the borough limits, and from an intersection on Centre Square westwardly upon and along Chambersburg street and Springs road to the borough limits, and from the
16 intersection of Washington street and Chambersburg street southwardly upon and along Washington street and Taneytown road to the borough limits, and from said intersection of Washington street and Chambersburg street northwardly upon and along Washington street to Railroad street.

Under and in accordance with the provisions of the said act of assembly certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for recording of deeds for the county of Adams, in Deed-Book S. S., folio 192; one of said branches or extensions beginning at a point on the Baltimore pike at the Gettysburg borough limits; thence along and upon said pike in a southerly direction about six hundred feet; thence through land of the said company in a westerly direction about eighteen hundred feet to the Taneytown road; thence along and upon said Taneytown road in a northerly direction about four hundred feet (with two branches along and upon said Taneytown road, one in a southerly direction about one thousand feet to Meade's headquarters, the other in a northerly direction about eight hundred feet to the Gettysburg borough limits); thence in a westerly direction through land of the said company about six hundred feet; thence in a southerly direction thirty-three hundred feet to the Round Top extension of the Gettysburg and Harrisburg Railroad; thence along and upon the right of way of the said Round Top extension of said railroad fifty-five hundred feet in a southerly direction to a point one hundred feet northerly from the Round

Top warehouse on the said railroad; thence in a westerly direction through land of said electric railway company about three hundred feet to the public road leading from the Taneytown road to the Emmittsburg road by way of Round Top station; thence partly along and upon said public road and partly on land of said company westwardly about five hundred feet; thence through land of said company in a southwesterly direction about thirty-two hundred feet; thence through land of said company in a northwesterly direction forty-one hundred feet to the aforesaid
17 public road leading from the Taneytown road to the Emmittsburg road; thence partly through land of said company and partly upon and along said public road westwardly about twelve hundred feet to the Emmittsburg road; thence along and upon said Emmittsburg road in a northerly direction about eighty-four hundred feet to the Gettysburg borough limits.

And the others, beginning at a point on Springs road or avenue and the Gettysburg borough limits; thence along and upon said Springs road or avenue in a westerly direction about twenty-three hundred feet, with a branch still along and upon said Springs road or avenue to the Gettysburg Mineral Springs Hotel for a distance of about three thousand feet; thence northwardly through private land nearly parallel with Reynolds avenue about five thousand feet to the Mummasburg road; thence southeasterly along and upon said Mummasburg road about four thousand feet to the Gettysburg borough limits. Also, beginning at the point where Howard avenue intersects the Mummasburg road; thence northeastwardly nearly parallel with Howard avenue through private land twenty-eight hundred feet; thence southwardly through private land about three thousand feet to the borough of Gettysburg limits. Also, beginning at the intersection of Howard avenue with the Carlisle road; thence southwardly upon and along the Carlisle road about twenty-one hundred feet to the Gettysburg borough limits.

A plan of the whole of said railway and of the routes of the said branches or extensions is filed herewith as a part of this answer.

The supervisors of Cumberland Township, Adams County, have duly consented to the construction of the said branches or extensions upon the streets and highways forming parts of the routes thereof.

II. By five certain deeds of conveyance, this defendant acquired as a part of the route of the first mentioned branch or extension, and for the purpose of using the same as part of its right of way, the tract of land particularly mentioned and described in paragraph 4 of the said
18 petition, and which is the subject of the present condemnation proceedings. The said tract of land is a narrow strip over six thousand feet long. It is all that part of the railway of this respondent between the points marked "A" and "B" on the said plan.

The said deeds bore date respectively as follows: November 11th and 14th, 1891; December 15th, 1891; January 12th, 1892; and November 25th, 1892. The first four were all recorded in the recorder's office for Adams County on February 9th, 1892, and the last one was recorded on November 25th, 1892.

III. The said Gettysburg Electric Railway Company located the line of its said first-mentioned branch or extension over and upon the tract of land mentioned in the said petition, upon its acquisition as aforesaid, and

after the taking of the corporate proceedings aforesaid—that is, as early as February 4th, 1892—and it has since completed the construction of its railway track throughout the entire length thereof. The said tract of land is an integral part of the right of way of the said branch or extension and of the franchise of said company.

The said first-mentioned branch or extension was entirely finished from the commencement to the end thereof, as above described, some time before the institution of these proceedings and before the introduction of the joint resolution approved June 6th, 1894. It is and has been since May 1st, 1894, in connection with the main line of the railway of this defendant in the borough of Gettysburg, in full and actual operation.

The other branches or extensions have not yet been constructed.

IV. The effect of the condemnation of the said strip of ground will be to cut the said branch railway or extension in two, destroy its continuity and prevent its further operation.

The said Gettysburg Electric Railway Company does not possess the right of eminent domain, and if the said part of its said branch railway be appropriated and taken from it it will not be able to procure adversely from the owners of the adjoining land any other ground in the
19 place thereof, upon which to build its railway and complete and preserve the route of the said extension.

V. The capital stock of the Gettysburg Electric Railway Company is $200,000, of which $100,000 has been issued. The said company has also issued mortgage bonds to the amount of $200,000, all of which are outstanding in the hands of holders for value. The said bonds and stock or the proceeds thereof have been used and expended in the construction of the said company's railway, and a large part of said proceeds has been expended in the construction of the first-mentioned branch or extension.

The value of the said railway and its said branch and franchise is more than the total amount of the said stock and bonds, and this value is so dependent upon the possession and operation of the said branch or extension that an appropriation by the United States of a part thereof, as proposed under the proceedings in this case, will so impair the value of the whole that the damages to be claimed by the respondent in case of condemnation will necessarily be the whole or the greater part of the said value.

VI. The greater part of the appropriation of $25,000 under the act of March 3d, 1893, has already been expended for the purposes stated therein; the balance thereof remaining to the credit of said appropriation, as of June 9th, being only the sum of $9,272.56.

VII. It is not true that in order to carry out the purposes of the said act of March 3d, 1893, or any of them, or to completely execute the said act, it is necessary that the United States shall condemn and appropriate or acquire the tract of land in said petition specified. On the contrary, the respondent avers that the proposed condemnation of a part of its right of way and of its railway and of the franchise connected therewith is an arbitrary use of supposed power, exercised only for the avowed purpose of driving the railway of the respondent entirely off the battlefield of Gettysburg.

20 The respondent denies that the lines of battle at Gettysburg and the positions occupied by the various commands of the armies of

the Potomac and of Northern Virginia on that field are truly and accurately indicated and shown on the blue print annexed to the petition.

On the contrary, it avers that the line of the said branch railway has been arbitrarily marked and designated as being exactly coincident with the said lines and positions, in order that it may seem to appear that in fact both are upon precisely the same strip of ground, and that therefore the line of the said branch railway is needed to carry out the purposes of the said act. This is so patent that a mere inspection of the said blue print suggests the thought at once.

The respondent avers that the proposed condemnation of a part of its branch railway is an abuse of power, if any exists, which should not be permitted to be carried into successful execution.

Witness the seal of the said Gettysburg Electric Railway Company, this nineteenth day of June, 1894.

E. M. HOFFER,
President.

Attest:
[SEAL.]

H. G. WALMER,
Secretary.

CHARLES HEEBNER.
THOMAS HART, Jr.
DAVID WILLS.

(Endorsed:) No. 34, Apl. sess., 1894. C. C. U. S., E. D. of Pa. United States vs. A certain tract of land in Cumberland Township, Adams County, Pennsylvania. Answer. Filed June 19, 1894. Samuel Bell, clerk.

21 In the Circuit Court of the United States for the eastern district of Pennsylvania, third circuit.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.

Of April sessions, 1894. No. 34.

Sur petition of Ellery P. Ingham, esq., United States Attorney.

The Gettysburg Electric Railway Company, the owner of the tract of land mentioned in the said petition, moves to quash the said petition, and assigns causes therefor, as follows:

I. The act of Congress, approved August 1st, 1888, provides for the acquisition of real estate by the United States by condemnation, only for the erection of public buildings or for other public uses. It does not appear in the said petition that the Secretary of War has been authorized to procure the tract of land mentioned in the fourth paragraph of the said petition, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3d, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons.

22 II. The purposes specified in the sixth paragraph of the said petition, namely, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," are none of them public uses or purposes authorizing the condemnation by the United States of private property.

III. Because it appears by the answer of the Gettysburg Electric Railway Company to the said petition, filed with this motion, that the Gettysburg Electric Railway Company is a corporation of the State of Pennsylvania, formed by articles of association on July 28th, 1891, under the act of assembly providing for the incorporation and government of street railway companies, approved May 14th, 1889, for the construction of a railway from a point in Gettysburg, Adams County, Pennsylvania, upon and along certain highways to the borough limits, and that under and in accordance with the provisions of the said act, certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for the recording of deeds in and for the county of Adams, in deed-book S. S., folio 192; one of the said branches or extensions beginning at a point on the Baltimore Pike at the Gettysburg borough limits; thence along and upon said pike in a southerly direction about six hundred feet; thence through land of said electric railway company in a westerly direction about eighteen hundred feet to the Taneytown road; thence along and upon said Taneytown road in a northerly direction about four hundred feet (with two branches along and upon said Taneytown road, one in a southerly direction about one thousand feet to Meade's headquarters, the other in a northerly direction about eight hundred feet to the Gettysburg borough limits); thence in a westerly direction through land of said railway company about six hundred feet; thence in a southerly
23 direction thirty-three hundred feet to the Round Top extension of the Gettysburg and Harrisburg Railroad; thence along and upon the right of way of the said Round Top extension of said railroad fifty-five hundred feet in a southerly direction to a point one hundred feet northerly from the Round Top warehouse on the said railroad; thence in a westerly direction through land of said electric railway company about three hundred feet to the public road leading from the Taneytown road to the Emmittsburg road by way of Round Top station; thence partly along and upon said public road and partly on land of said railway company westwardly about five hundred feet; thence through land of said company in a southwesterly direction about thirty-two hundred feet; thence through land of said company in a northwesterly direction forty-one hundred feet to the aforesaid public road leading from the Taneytown road to the Emmittsburg road; thence partly through land of said company and partly upon and along said public road westwardly about twelve hundred feet to the Emmittsburg road; thence along and upon said Emmittsburg road in a northerly direction about eighty-four hundred feet to the Gettysburg borough limits.

And the others, beginning at a point on Springs road or avenue and the Gettysburg borough limits; thence along and upon said Springs road or

avenue in a westerly direction about twenty-three hundred feet, with a branch still along and upon said Springs road or avenue to the Gettysburg Mineral Springs Hotel, for a distance of about three thousand feet; thence northwardly through private land nearly parallel with Reynolds avenue about five thousand feet to the Mummasburg road; thence southeasterly along and upon said Mummasburg road about four thousand feet to the Gettysburg borough limits. Also, beginning at the point where Howard avenue intersects the Mummasburg road, thence northeastwardly nearly parallel with Howard avenue through private land twenty-eight hundred feet; thence southwardly through private land about three thousand feet to the borough of Gettysburg limits. Also, beginning at the intersection of Howard avenue with the Carlisle road, thence southwardly upon and along the Carlisle road about twenty-one hundred feet to the Gettysburg borough limits.

And because it so appears that the tract of land particularly mentioned in the fourth paragraph of the said petition, belonging to the said electric railway company, was acquired by various deeds of conveyance as a part of the right of way of the said first-mentioned branch or extension, and that in point of fact the said tract of land sought to be condemned, which is a long narrow strip over six thousand feet in length, is an integral part of the right of way of the said branch or extension and of the franchise of the said electric railway company, the effect of the condemnation of which will be to cut the said branch in two, destroy its continuity, and prevent its further operation.

Neither the act of Congress approved August 1st, 1888, nor the act approved March 3d, 1893, nor the joint resolution approved June 6th, 1894, was intended to authorize the Secretary of War to procure for the United States by condemnation any land which had been already devoted to a public use.

IV. The said petition does not show any authority in the Secretary of War, warranting the condemnation of a part of the railway and franchises of the Gettysburg Electric Railway Company.

V. Because it appears by the answer of the said electric railway company, that the tract of land mentioned in the petition is a part of the railway of the said company actually constructed before the passage of the joint resolution of June 6th, 1894, and then in full operation. If the said joint resolution can be taken as intending to authorize the acquisition by condemnation of any part of the right of way of the said electric railway company, it shows by its terms that it was intended to refer only to the acquisition of that part of the right of way of the said company, upon which it was proposed to construct thereafter such portion of its railway as had been theretofore unconstructed.

VI. If the acts of Congress and the joint resolution mentioned in the said petition were intended to authorize the acquisition by condemnation of a railway and the franchises connected therewith, they will not be taken to authorize the appropriation of a part only thereof. The right of way upon which the railway of the respondent has been constructed and the franchise of operating the same is a unit and is not capable of subdivision and partial appropriation.

VII. It does not appear by the said petition that any ap'priation has ever been made by Congress for the purchase of the real estate mentioned

in the fifth paragraph of the petition, or of any real estate to be acquired for the purposes referred to in the act of March 3d, 1893, or for the payment of damages therefor in case of the condemnation thereof. The said act does not provide any means by which the respondent can obtain payment of the damages to be awarded to it for the appropriation of the said tract of land. If the said petition be allowed and a jury be appointed, and the property of the said electric railway company be condemned and appropriated, the said company will be without any remedy whereby payment of the damages awarded can be obtained or enforced.

VIII. Because it appears by the said answer of the Gettysburg Electric Railway Company that the appropriation of $25,000 mentioned in the said act of March 3d, 1893, has been, to a large extent, already expended for the purposes specified in the said act, the sum of $9,272.56 only remaining unexpended, and that, in point of fact, no adequate fund exists for the payment of the damages to be awarded the respondent for the appropriation of the said strip of ground.

IX. Because it is provided in the joint resolution of Congress approved June 6th, 1894, set out in the fourth paragraph of the said petition, "that no obligation or liability upon the part of the Government shall be
26 incurred under this resolution or any expenditure made except out of appropriations already made and to be made during the present session of this Congress." The said joint resolution thus places a limit upon the amount of damages for which only an obligation or liability on the part of the Government is recognized, and prohibits this respondent from obtaining payment from the United States of any sum which may be awarded to it in excess of the balance remaining of the appropriation made by the act of March 3d, 1893, to wit, the sum of $9,272.56, and of some amount which may be, but which has not been, appropriated during the present session of this Congress. The said joint resolution is therefore unconstitutional and void.

X. The said joint resolution of Congress approved June 6th, 1894, provides for the acquisition by purchase or condemnation of such lands as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3d, 1893. It does not appear in or by the said petition that the Secretary of War has determined that in his judgment the acquisition of the tract of land mentioned and described in the said petition is necessary for the complete execution of the said act of March 3d, 1893.

XI. It does not appear in and by the said petition for what particular purpose, of those mentioned in the act of March 3d, 1893, the strip of ground mentioned in the petition is necessary to be acquired.

XII. Because it appears by the answer of the said electric railway company that it is not necessary for the complete execution of the act of March 3d, 1893, that the strip of ground mentioned in the petition should be acquired by the United States, and that the proposed condemnation is an abuse of power.

XIII. Because it does not appear in and by the said petition
27 that any effort to agree with the said electric railway company for the purchase of the tract of land mentioned in the petition, or for the settlement of the amount of the damages to be paid in case of condemnation thereof, has been made by the United States.

XIV. Because the said petition is in other respects defective and insufficient.

CHARLES HEEBNER.
THOMAS HART, Jr.
DAVID WILLS.

June 19th, 1894.

(Endorsed:) No. 34, April sess., 1894, C. C. U. S., E. D. of Pa. U. S. A. v. A certain tract of Land, &c. Motion to quash. Filed June 19, 1894. Samuel Bell, clerk.

28 THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.
U. S. C. C., E. D. of Pa. No. 34. April S., 1894.

June 19, 1894. The motion to quash the petition filed upon June 19, 1894, in the above proceedings is denied, but without prejudice to any question thereby raised, and with leave to present the same questions for consideration of the court upon the coming in of the report of the jury to be appointed.

By the court: Dallas, Cir. J., and Butler, Dist. J.

(Endorsed:) No. 34, April sess., 1894, U. S. C. C., E. D. of Pa. U. S. of A. vs. A Certain Tract of Land, etc. Order denying motion to quash. Samuel Bell, clerk.

29 THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.
U. S. C. C., April S., 1894. No. 34.

And now, to wit, this 23rd day of June, A. D. 1894, the petition of Ellery P. Ingham, United States attorney in the above proceedings, having been presented, and due notice thereof having been given, the court, upon consideration, do hereby appoint the following resident freeholders of the county of Adams, State of Pennsylvania, viz, George Stonesifer, David Rhodes, Alexander S. Himes, David P. Forney, Thomas G. Neely, Peter Kready, A. Fleming White, to estimate and determine the fair value of all and singular the estates and interests in the lands proposed to be taken for the use of the United States in the above proceedings, and to
30 designate the several owners of said lands as far as the same can be reasonably ascertained, and to report the same to this court.

And it is further ordered that said jury, after having been duly qualified, shall give ten days' notice of their appointment, and of the time and place of meeting, when and where all parties interested may appear and will be heard, by publication in the Compiler, a newspaper of said Adams County, for ten successive days, and by serving a copy of this order and such notice either at the residence of or personally upon the persons alleged in the petition filed to be the owners of estates and interests in said lands.

And it is further ordered that the said seven resident freeholders and every of them be directed to be and appear at the office of the clerk of this court upon the 29th day of June, A. D. 1894, at twelve o'clock m., to be duly qualified for the purposes of their said appointment.

GEO. M. DALLAS,
Cir. J.

(Endorsed:) No. 34. April S., 1894. U. S. C. C., E. D. of Pa. United States of America vs. A certain tract of land in Cumberland Township, Adams County. Order of court (Dallas, J.) appointing jury. Samuel Bell, clerk.

31 THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.
U. S. C. C. April sessions, 1894, No. 34.

And now, to wit, this 26th day of June, A. D. 1894, it having been called to the attention of the court that there is no daily newspaper published in Adams County, it is hereby directed that the order of the 23rd day of June, A. D. 1894, in this case shall be amended as follows: By inserting the word "twice" in the fifth line of page No. 2 between the words "publication" and "in," and erasing from the seventh line of the same page the words "for ten successive days."

BY THE COURT.
(S. B.)

(Endorsed:) No. 34. April sess., 1894. U. S. C. C., E D. of Pa. The United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Penna. Amendment to order of court of June 23, 1894. Samuel Bell, clerk.

32 THE UNITED STATES OF AMERICA
vs.
ALL THAT CERTAIN TRACT OF LAND IN Cumberland Township, Adams County, owned by the Gettysburg Electric Railway Company.
U. S. C. C. April sessions, 1894. No. 34.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

John P. Nicholson, being duly sworn according to law, doth depose and say that he is one of the Gettysburg Battlefield Commission and a resident of the city of Philadelphia.

That he is informed and verily believes that Thomas J. Neeley, one of the jurors appointed by the circuit court in the above stated case to report the fair value of the lands proposed to be taken by the United States in the above proceeding, is, by reason of interest, an unsuitable person to serve in the capacity of juror; the interest alleged being this: He is an officer of the Gettysburg National Bank, of Gettysburg, Pa., to wit, director of said bank, in which said bank the Honorable David Wills,

senior counsel for the Gettysburg Electric Railway Company, is president and the principal stockholder; and the said Neeley holds his position there by reason of the friendship and vote of the said Wills; and the affiant truly believes that should said Thomas J. Neeley be per-
33 mitted to serve, the interests of the United States would be jeopardized.

JOHN P. NICHOLSON,
Commissioner.

Sworn and subscribed before me this 28th day of June, A. D. 1894, in open court.

JNO. A. MERRICK,
Pro Clerk U. S. C. C., E. D. of Pa.

34 THE UNITED STATES OF AMERICA
vs.
ALL THAT CERTAIN TRACT OF LAND IN Cumberland Township, Adams County, owned by the Gettysburg Electric Railway Company. | U. S. C. C. April sessions, 1894. No. 34.

And now, to wit, this 28th day of June, A. D. 1894, the attorney for the United States excepts to the appointment of Thomas J. Neeley as a juror in the above-stated case. upon the ground that by reason of interest he should be disqualified from serving in the capacity of juror.

ELLERY P. INGHAM,
U. S. Attorney.

THOMAS HART, Jr., Esq.,
Counsel for the Gettysburg Electric Railway Co.:

DEAR SIR: Please take notice that I have filed the above exception for the appointment of a juror in the above-stated case, and will call the matter before Judge Dallas in the circuit court at ten a. m. on Friday, June 29, 1894.

Yours, truly, ELLERY P. INGHAM,
U. S. Attorney.

35 (Endorsed:) No. 34. Apl. S., 1894. United States vs. Gettysburg Electric Railway Co. Exception to Juror Thos. J. Neeley. Ingham, U. S. atty.

36 THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERland Township, Adsma County, State of Pennsylvania. | U. S. C. C., E. D. of Pa. April sessions, 1894. No. 34.

I. The appointment of Thomas G. Neely as one of the jurors in the above matter is revoked; but it is proper to say that in this no reflection whatever upon the character of that gentleman is made or implied. This action is taken only upon the ground and for the reason that, in the opinion of the court, no person should act as a juror to whom objection upon the score of supposed interest is made.

II. Samuel S. Moritz, farmer, Freedon Township, is hereby substituted as a juror in place of the said Thomas G. Neely.

III. It is ordered that the actual expenses of said Thomas G. Neely in coming to Philadelphia, and a reasonable allowance for his time occupied in coming to Philadelphia, shall be paid by the United States, upon whose application the revocation of his appointment is made.

GEO. M. DALLAS,
Cir. Ct. J.

June 29, 1894.

37 The actual expense incurred and the time necessarily occupied may be paid by affidavit to be filed, and five dollars per day is approved as a proper allowance for time in coming to Philadelphia.

G. M. D.

(Endorsed:) No. 34, April session, 1894, C. C. U. S., E. D. of Pa. United States vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. Order of court rescinding appointment of Thomas G. Neely and appointing Samuel S. Moritz. Filed June 29, 1894. Samuel Bell, clerk.

38 Circuit court of the United States, eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.

To the honorable the judges of the said court:

The undersigned, the jurors appointed by your honorable court on the twenty-third day of June, A. D. 1894, "to estimate and determine the fair value of all and singular the estates and interests in the lands proposed to be taken for the use of the United States in the above proceedings, and to designate the several owners of the said lands, so far as the same can be reasonably ascertained, and to report the same to this court," respectfully represent that they met at the office of the clerk of the court upon the 29th day of June, A. D. 1894, at twelve o'clock, m., and that having been duly qualified by oath or affirmation on the same day, and
39 by and in the office of the clerk of the court, to well and truly fulfill and discharge the duties of their appointment, they organized by the election of George Stonesifer as chairman, and gave public notice of their appointment and of the time and place of their meeting by publication in "The Compiler," a newspaper of said Adams County, twice, of the advertisement, a copy of which is hereto annexed, marked "A," and by causing to be served a copy of the order of the court and such notice personally upon the Gettysburg Electric Railway Company; on E. M. Hoffer, president of the said corporation, alleged in the petition filed in this cause to be the owner of the estates and interests in said

lands; and in accordance with said notice and said advertisement the jury met at the court-house of Adams County at Gettysburg, Pa., on Wednesday, the first day of August, A. D. 1894, at twelve o'clock, m., and thence proceeded to view the said lands and premises, at which said meeting witnesses were examined on behalf of the said owner and claimant and on behalf of the United States.

The Gettsyburg Electric Railway Company was represented by its counsel, Charles Heebner, esq., Thomas Hart, jr., esq., and Hon. David Wills; the United States was represented by Robert Ralston, esq., asst. U. S. attorney, and Ellery P. Ingham, esq., U. S. attorney.

On the first day of August the jury adjourned, to meet again at Gettysburg on the 11th day of September, 1894, at which time and place
40 the parties, with their counsel, met with the jury, and testimony was taken upon the 11, 12, 1 , and 14th days of September. The meeting was then adjourned until September 28, 1894, at Philadelphia, which was the time and place fixed for the hearing of the argument. On the 28th day of September the hearing was further continued by agreement until the 22nd of October, upon which time there was a further continuance until the 29th day of October. Upon this latter date the parties, with their counsel, met in the office of the U. S. attorney, in the city of Philadelphia.

The case was argued on behalf of the Gettysburg Electric Railway Company by Charles Heebner, esq., and Thomas Hart, jr., esq., and on the part of the United States by Robert Ralston, esq., asst. U. S. attorney, and Ellery P. Ingham, esq., U. S. attorney.

The argument occupied the 29th, 30th, and 31st of October. The jury then immediately went into session and remained in continuous session on November 1st, 2nd, and 3rd, at which time they arrived at an agreement.

The petition avers that in order to carry out the purposes of an act of Congress approved the 3rd day of March, A. D. 1893, the Secretary of War, in accordance with the provisions of the 'ct of Congress of August 1, 1888, on the 18th day of April, A. D. 1894, made an application to the Attorney-General to cause proceedings to be instituted, and the Attorney-General, upon the 4th day of May, A. D. 1894, directed the United States
a'torney for the eastern district of Pennsylvania to institute pro-
41 ceedings for the condemnation of the tract of land shown in the blue print hereto annexed and described as follows:

Beginning at a point marked by an iron pin in the middle of the Wheatfield road, which point is S. 59° 57′ E. 1,187.7½ feet from an iron pin at the intersection of the Wheatfield road and the Emmitsburg road, said point being S. 74° 49′ E. 15 feet from a centre line of the Gettysburg Electric Railroad, produced N. 15° 11′ E.; thence by lands of the Gettysburg Battlefield Memorial Association S. 15° 11′ W. 872 feet; thence by lands of the memorial association S. 69° E. 24 feet to a point; thence still by lands of the memorial association S. 22° 20′ W. 108 feet to a white oak tree, being a corner; thence still by lands of the memorial association S. 32° E. 172 feet to a corner; thence still by lands of the memorial association S. 35° 40′ E. 200 feet to a corner stone; thence still along lands of the memorial association S. 21° 40′ W. 200 feet to a corner of lands of Rosanna E. Wible and the memorial association; thence by

the lands of said Rosanna E. Wible S. 78° 1′ W. 5[illegible] feet to a point 15 feet at right angles from a point on the centre line of the Gettysburg Electric Railroad; thence by lands of said Rosanna E. Wible S. 11° 59′ E. 1,260 feet parallel with and 15 feet distant at right angles from a centre line of said railroad to a point on the dividing line between said Rosanna E. Wible and James W. Timbers; thence continuing by the same course S. 11° 59′ E. by lands of James W. Timbers and the United States, parallel with and 15 feet distant at right angles from a centre line of said railroad, 632 feet to a point; thence N. 78° 1′ E. 10 feet by lands of the United States to a point 25 feet distant at right angles from a point on the centre line of said railroad; thence still by lands of the United States
42 S. 11° 59′ E. 120 feet, parallel with and 25 feet distant at right angles from a centre line of said railroad; thence still by lands of the United States by a curve to the left concentric with and 25 feet distant on a radial line of said curve from a centre line of said railroad, 525 feet to a point; thence still by lands of the United States N. 62° E. 403 feet to a point 15 feet distant at right angles from a point on a centre line of said railroad; thence still by lands of the United States N. 40° 41′ E. 1,413 feet parallel with and 15 feet distant at right angles from a point on a centre line of said railroad, to a point; thence by a curve to the right of about 490 feet radius concentric with and 15 feet distant on a radial line from the centre curved line of said railroad, 400 feet to a point; thence by lands of the United States N. 87° E. 18 feet parallel with and 15 feet at right angles from a point on the centre line of said railroad to a corner of United States property and Calvin P. Krise; thence along said boundary line S. 28° E. 16.5 feet to a point on a centre line of said railroad; thence continuing by the same course on said boundary line from said point in the centre of the said railroad S. 28° E. 29 feet to a corner of said Krise and the Gettysburg Battlefield Memorial Association; thence by lands of said memorial association S. 68½° W. 342 feet to a point; thence by lands of the memorial association S. 42½ W. 493 feet to a point 15 feet at right angles from a point on the centre line of said railroad; thence by lands of the said association S. 40° 41′ W. 141 feet parallel with and 15 feet at right angles from a centre line of said railroad to a point which is 5 feet southeast of a corner stone at a corner of the memorial association and W. H. Tipton's land; thence by lands of W. H. Tipton by the same course S. 40° 41′ W. 838 feet parallel with and 15 feet distant at right angles from a centre line of said railroad, to a point; thence by lands of W. H. Tipton S. 49° 19′ E. 5 feet to a point 20 feet distant at right angles from a point on the centre line of said railroad; thence still by lands of said Tipton S. 40° 41′ W. 70 feet parallel with and 20 feet distant at
43 right angles from a centre line of said railroad; thence still by lands of W. H. Tipton and the United States by a curve to the right concentric with and 20 feet distant on a radial line from a centre line of said railroad 528 feet to a point at the crossing of Plum Run; thence by lands of J. W. Timbers continuing by the same curved line concentric with the curved centre line of the said railroad, and 20 feet from it on a radial line, 425 feet to a point; thence N. 11° 59′ W. still by lands of James W. Timbers 120 feet to a point 20 feet at right angles from a point on a centre line of said railroad; thence by same lands N. 78° 1′ E. 5 feet

to a point 15 feet at right angles from a point on the centre line of said railroad; thence by lands of J. W. Timbers and Rosanna E. Wible N. 11° 59′ W. parallel with and 15 feet distant at right angles from a centre line of said railroad 2,318 feet to a point; thence by lands of said Rosanna E. Wible and by curve to the right concentric with and 15 feet distant on a radial line of said railroad, 177 feet to a point; thence still by lands of Rosanna E. Wible N. 15° 11′ E. parallel with and 15 feet distant at right angles from a centre line of said railroad 761.5 feet to a point; thence still by lands of the said Rosanna E. Wible by a curve to the left concentric with and 15 feet distant on a radial line from the centre line of said railroad 177 feet to a point; thence by lands of the said railroad N. 15° E. 15 feet to a point in the middle of the said railroad; thence by the same course 30 feet to the middle of the said Wheatfield road; thence S. 59° 57′ E. 125 feet to the place of beginning. Containing 7 2-100 acres.

The jury find that the Gettysburg Electric Railway Company is the owner of said lands and interests proposed to be taken, and the jury estimates and determines the fair value of all and singular the estates and interests in said lands proposed to be taken for the use of the United States in this proceeding to the thirty thousand (30,000) dollars.

And the jury awards the said Gettysburg Electric Railway Company the said sum of thirty thousand (30,000) dollars subject to the con-
44 ditions that all liens and encumbrances upon said land shall be discharged by the said owner before payment shall be made by the United States therefor, and that all taxes lawfully assessed thereon, and including the taxes for the year during which the United States shall enter upon said land shall be paid by the said owner, and before payment shall be made by the United States as compensation therefor, and that the award herein made shall not bear interest until the owner by itself or its attorney shall have accepted the same and until the United States shall have entered upon and taken possession of, and dispossed the said owner of the said estate, and then and in that event this said award shall bear interest from the date of said entry and dispossession.

All of which is respectfully submitted.

GEO. STONESIFER.
ALEX. S. HIMES.
PATER KREADY.
SAMUEL T. MORITZ.
DAVID P. FORNEY.
DAVID RHODES.
A. F. WHITE.

(Endorsed:) No. 34, April sess.: 1894, U. S. C. C. The United States vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. Report of jury filed Nov. 8, 1894. Samuel Bell, clerk.

45 In the circuit court of the United States for the eastern district of Pennsylvania, third circuit.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	Of April Sessions, 1894. No. 34.

Exceptions upon behalf of the Gettysburg Electric Railway Company, to the report and award of the viewers, filed November, 1894, in the above-entitled proceeding.

The Gettysburg Electric Railway Company, the owner of the land mentioned in the said report, excepts to the award of the viewers, for the following reasons:

I. The act of Congress approved August 1st, 1888, provides for the acquisition of real estate by the United States by condemnation, only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, esq., United States attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the fifth paragraph thereof, belonging to the Gettysburg Electric Railway Company, for the erection of a public building
46 or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3d, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons.

II. The purposes specified in the sixth paragraph of the said petition, namely, "Of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," are none of them public uses or purposes authorizing the condemnation by the United States of private property.

III. Because it appears by the answer of the Gettysburg Electric Railway Company to the said petition, that the Gettysburg Electric Railway Company is a corporation of the State of Pennsylvania, formed by articles of association on July 28, 1891, under the act of assembly providing for the incorporation and government of street railway companies, approved May 14th, 1889, for the construction of a railway from a point in Gettysburg, Adams County, Pennsylvania, upon and along certain highways to the borough limits, and that under and in accordance with the provisions of the said act, certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for the recording of deeds in and for the county of Adams, in deed-book S. S., folio 192. And because it so appears that the tract of land particularly mentioned in the fifth paragraph of said petition, belonging to the said electric railway company, was acquired by various deeds of conveyance as a part of the right of way of one of the said branches or extensions, and that, in point of fact, the said

tract of land sought to be condemned, which is a long, narrow strip over six thousand feet in length, is an integral part of the right of way of one of the said branches or extensions and of the franchise of said electric railway company, the effect of the condemnation of which will be to cut the said branch in two, destroy its continuity, and prevent its further operation.

47

Neither the act of Congress approved August 1st, 1888, nor the act approved March 3d, 1893, nor the joint resolution approved June 6th, 1894, was intended to authorize the Secretary of War to procure for the United States by condemnation any land which had been already devoted to a public use.

IV. The said petition does not show any authority in the Secretary of War warranting the condemnation of a part of the railway and franchises of the Gettysburg Electric Railway Company.

V. Because it appears by the answer of the said electric railway company that the tract of land mentioned in the petition is a part of the railway of the said company, actually constructed before the passage of the joint resolution of June 6th, 1894, and then in full operation. If the said joint resolution can be taken as intending to authorize the acquisition by condemnation of any part of the right of way of the said electric railway company, it shows by its terms that it was intended to refer only to the acquisition of that part of the right of way of the said company upon which it was proposed to construct thereafter such portion of its railway as had been theretofore unconstructed.

VI. If the acts of Congress and the joint resolution mentioned in the said petition were intended to authorize the acquisition by condemnation of a railway and the franchises connected therewith, they will not be taken to authorize the appropriation of a part only thereof. The right of way upon which the railway of the respondent has been constructed and the franchise of operating the same is a unit and is not capable of subdivision and partial appropriation.

VII. It does not appear by the said petition that any appropriation has ever been made by Congress for the purchase of the real estate mentioned in the fifth paragraph of the petition, or of any real estate to be acquired for the purposes referred to in the act of March 3d, 1893, or for the payment of damages therefor upon the condemnation thereof. The said act does not provide any means by which the respondent can obtain payment of the damages awarded to it for the appropriation of the said tract of land. The said company is without any remedy whereby payment of the damages awarded can be obtained or enforced.

48

VIII. The said joint resolution of Congress, approved June 6th, 1894, provides for the acquisition by purchase or condemnation of such lands as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3d, 1893. It does not appear in or by the said petition that the Secretary of War has determined that in his judgment the acquisition of the tract of land mentioned and described in the said petition is necessary for the complete execution of the said act of March 3d, 1893.

IX. It does not appear in and by the said petition for what particular purpose of those mentioned in the act of March 3d, 1893, the strip of ground mentioned in the petition is necessary to be acquired.

X. Because error was committed in the trial before the viewers, in that the United States attorney offered and the jury admitted and heard evidence of a resolution passed by the executive committee of the Gettysburg Battlefield Memorial Association at a meeting held July 31st, 1894, as follows:

"For the purpose of removing the line of the Gettysburg Electric Railroad from historic points of the battlefield, which the Government desires to preserve and mark, I move the Gettysburg Battlefield Memorial Association, for the purpose of facilitating the completion of the circuit of the Gettysburg Electric Railroad in the event of its present route being
49 disturbed or interfered with by the United States by its appropriating any portion of the same for their purposes, grant to the said railroad the right of way to construct their said road over the land of the said association along what is known as the Wheatfield road."

Which was accompanied by a letter, also offered in evidence and admitted and heard by the jury, as follows:

"WAR DEPARTMENT,
"GETTYSBURG BATTLEFIELD COMMISSION,
"*Gettysburg, Pa., August* 1, 1894.

"*Mr. E. M. Hoffer, President of Gettysburg Electric Railway Company:*

"SIR: In order to correct misrepresentations as to the purposes of the United States in condemning a portion of your route under the authority of the act of Congress March 3d, 1893, for the preservation of the Gettysburg battlefield, we beg to inclose herewith a certified copy of a resolution passed by the executive committee of the Gettysburg Battlefield Memorial Association at a meeting held July 31st, 1894. By this resolution it will be seen that a right of way is granted for your electric railway company along the Wheatfield road when the United States shall have acquired that part of your line now under condemnation. In connection with the grant of right of way by the memorial association, the United States Gettysburg Battlefield Commission can insure that a similar right of way will be granted by the United States over the lands owned by the Government, thus enabling you to build your road by a direct, convenient, and economical route and with an easy grade from the point near the Peach Orchard to the connection with your own line near Little Round Top, at the point to which the United States seeks to condemn your line. The proposition now reduced to writing is not a new one, but is the same proposition submitted to you verbally by the commission before you built your road through the Devil's Den and the Valley of Death. This commission has never sought and does not seek to deprive you of a connection for your electric railway, but on the contrary
50 is willing to insure your right of way, provided you do not go upon ground required for the preservation of the lines of battle.

"JOHN P. NICHOLSON.
"JOHN B. BACHELDER.
"WM. M. ROBBINS."

XI. Because error was committed in the trial before the viewers, in that the United States attorney offered and the jury admitted and heard the evidence of four witnesses, R. H. Johnson, D. B. Conders, Michael

Farrell, and Arthur Favorite, all of whom were contractors for doing railroad work, as to the cost of constructing a new line of railway along the Wheatfield road, which was proposed and offered as a substitute for that part of the railway mentioned in the petition and sought to be condemned.

XII. Because error was committed in the trial before the viewers, in that the United States attorney offered and the jury admitted and heard the evidence of nine witnesses, namely, John B. Bachelder, T. P. Ege, Adam Martin, John M. Warner, Dr. Robert Horner, J. W. Deal, Calvin Gilbert, D. A. Skelly, Edward McPherson, and Charles H. Buehler, the testimony of all of whom was exclusively based upon the construction of the proposed new line along Wheatfield road, and the substitution thereof for the line condemned and proposed to be taken.

XIII. Because all the evidence offered by the United States attorney, and admitted and heard by the jury, upon the subject of the construction of the proposed new line along Wheatfield road, and of the substitution thereof for the part of the plaintiff's railway mentioned in the petition, was irrelevant and inadmissible.

XIV. Because the whole defense of the United States to the claim of the plaintiff was based upon the construction of a new line along Wheatfield road and upon its substitution for the part of plaintiff's railway sought to be condemned.

51 XV. Because error was committed in the trial before the viewers, in that the United States attorney offered and the jury admitted and heard evidence upon various subjects other than that of the damages to be awarded to the Gettysburg Electric Railway Company, which evidence was irrelevant and inadmissible.

CHAS. HEEBNER,
THOMAS HART, Jr.,
Exceptant's Attorneys.

NOVEMBER 12th, 1894.

(Endorsed:) No. 34, April sessions, 1894, U. S. circuit court, E. D. of Penna. United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Penna. Exceptions on behalf of the Gettysburg Electric Railway Company. Chas. Heebner, Thomas Hart, jr. Filed Nov. 12, 1894. Samuel Bell, clerk.

52 Circuit Court of the United States, eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	April sessions, 1894. No. 34.

In the matter of the appeal of the Gettysburg Electric Railway Company from the finding and award of the jury appointed in the above entitled matter to estimate and determine the fair value of all and singular the estates and interests in the lands proposed to be taken for the use of the United States and to designate the several owners thereof.

And now, to wit, on the twelfth day of November, 1894, the said jury having heretofore, to wit, on the eighth day of November, 1894, reported inter alia that the owner of the premises particularly described in the said report, proposed to be taken, in the Gettysburg Electric Railway Company, and that the fair value thereof is the sum of thirty thousand dollars, and having awarded to the said Gettysburg Electric Railway Company the said sum of thirty thousand dollars.

53 And the said Gettysburg Electric Railway Company, being aggrieved by the report of the jury as aforesaid, hereby appeals from the said report of the jury, reporting as aforesaid, and demands a trial by jury, and further demands that the fair value of the lands and interests proposed to be taken by the United States shall be estimated and determined and the owner thereof shall be designated in accordance with law and the practice of the court.

CHAS. HEEBNER,
THOMAS HART, Jr.,
For The Gettysburg Electric Railway Company.

NOVEMBER 12, 1894.

54 UNITED STATES OF AMERICA,
Eastern District of Penna., ss:

E. M. Hoffer, having been duly sworn according to law, deposes and says, that he is the president of the Gettysburg Electric Railway Company, and that the appeal of the said company from the finding and award of the jury appointed in the foregoing entitled proceedings is not taken for the purpose of delay, but because he firmly believes that injustice has been done.

E. M. HOFFER.

Sworn to and subscribed before me this 12th day of Nov., 1894.

SAMUEL BELL,
U. S. Commissioner.

(Endorsed:) No. 34, April S., 1894, U. S. C. C., E. D. of Pa. United States vs. A certain tract of land in Cumberland Township, Adams Co., Penna. Appeal of the Gettysburg Electric Railway Company. Chas. Heebner, Thomas Hart, jr. Samuel Bell, clerk.

55 Circuit court of the United States, eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	April sessions, 1894. No. 34.

In the matter of the appeal of the United States of America from the finding and award of the jury appointed by the above court to estimate and determine the fair value of all and singular the estates and interests in the lands proposed to be taken for the use of the United States and to designate the several owners thereof:

And now, to wit, this 27th day of November, A. D. 1894, the said jury having heretofore, to wit, upon the 8th day of November, A. D.

1894, reported inter alia that the owner of the lands proposed to be taken is the Gettysburg Electric Railway Company, and that the fair value thereof is the sum of thirty thousand dollars, and having awarded to the said Gettysburg Electric Railway Company the said sum of thirty thousand dollars.

And the United States of America being aggrieved by the report
56 of the jury as aforesaid, do hereby appeal from said report of said jury, and further demands that the fair value of the lands and interests proposed to be taken by the United States shall be estimated and determined and the owner thereof shall be designated in accordance with law and the practice of the court.

ELLERY P. INGHAM,
U. S. Attorney.

NOVEMBER 30, 1894.

(Endorsed:) No. 34. April S., 1894. The United States vs. A certain tract of land in Cumberland Township, Adams Co., State of Pennsylvania. Appeal of the United States. Ellery P. Ingham, U. S. atty. Samuel Bell, clerk.

57 In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	April sessions, 1894. No. 43.

The further and amended answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, further answering the said petition, says:

That since the making of its answer filed February 5, 1895, it has ascertained, and therefore now avers, that the balance remaining unexpended of the appropriation of $25,000 under the act of March 3, 1893, is only $2,882.17, and that of the said sum of $50,000 appropriated under the act of August 18, 1894, there has been already expended the sum of $14,000.

Witness the corporate seal of The Gettysburg Electric Railway Company, duly attested, this 18th day of February, 1895.

THE GETTYSBURG ELECTRIC RAILWAY CO.
[SEAL.] By E. M. HOFFER, *President.*
Attest:
H. G. WALMER, *Secretary.*

58 (Endorsed:) No. 34. April sessions, 1894. U. S. circuit court. United States vs. A certain tract of land in Cumberland Township, Adams Co., Penna. Further and amended answer of The Gettysburg Electric Ry. Co. Chas. Heebner, Thomas Hart, jr. Filed Feb. 20, 1895. Samuel Bell, clerk.

59 In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	April sessions, 1894. No. 34.

The further and secondly amended answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, further answering the said petition, says:

That since the filing of its further and amended answer in the above-entitled matter upon February 20, 1895, it has ascertained, and therefore now avers, that the entire balance remaining unexpended of the appropriation of $25,000 under the act of March 3, 1893, and of the sum of $50,000 appropriated under the act of August 18, 1894, are covered by contracts already made under authority from the Secretary of War for which the said appropriations were made, and that the execution of the said contracts will require the expenditure of the entire balance remaining of both the said appropriations; so that there is not, in point of fact, at this time, any part of either of the said appropriations which is

60 available for the purpose of paying and discharging any judgment which may be recovered by the Gettysburg Electric Railway Company in this proceeding.

Witness the corporate seal of the Gettysburg Electric Railway Company, duly attested, this 18th day of March, 1895.

THE GETTYSBURG ELECTRIC RAILWAY COMPANY.
[SEAL.] By E. M. HOFFER, *President.*
Attest:
H. G. WALMER, *Secretary.*

CHARLES HEEBNER.
THOMAS HART.

MCH. 20, 1895.

(Endorsed:) No. 23. April sessions, 1894. U. S. circuit court, E. D. of Pa. The United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Penna. Further and secondly amended answer of The Gettysburg Electric Railway Co. Filed March 20, 1895. Samuel Bell, clerk.

61 And afterwards, to wit, on the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and ninety-five, comes the parties aforesaid, and this case being called for argument on exception filed by the Gettysburg Electric Railway Company to the report of the jury, and being argued by counsel for the respective parties, and the court not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-five, comes the parties aforesaid, and the court now being fully advised in the premises, renders the following opinion, viz:

62 Circuit court of the United States, eastern district of Pennsylvania.

THE UNITED STATES *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, Pennsylvania.	April sess., 1894.	No. 34.
SAME *vs.* SAME.	Oct. sess., 1894.	No. 64.

DALLAS, Cir. J. The right of the United States to take private property for public use, upon making just compensation, though questioned in Pollard's Lessee v. Hagen, 3 How., 212, is now fully recognized; but that this right can not be exercised within the limits of the several States for any purpose which is not incident to some power delegated to the General Government, and necessary, or at least adapted, to its execution, is equally well settled. Hare on the Constitution, vol. 1, p. 346; Kohl v. U. S., 367; U. S. v. Fox, 94 U. S., 315; Van Brocken v. Tennessee, 117 U. S., 151; Cherokee Nation v. Kansas Railway Company, 135 U. S., 641 (656).

The end sought to be promoted in the present instance highly commends itself to patriotic sentiment, and strongly appeals to the generous impulses of all who justly esteem the services of those by whom the great battle of Gettysburg was fought and won; but such feelings may not be indulged in a place where justice is judicially administered without respect
63 to persons, and where the Constitution of the United States must be regarded as imperatively prescribing the paramount rule of civil conduct as well for the Government as for the people. Therefore the only question is, whether the object to the furtherance of which these petitions are directed is germane to the execution of any power vested in the General Government, and upon this question I have reached a conclusion which to me seems irresistible. The powers of Congress are distinctly enumerated in the Constitution, and in that enumeration none is included to which the uses for which it is proposed to condemn this land can be related, without, in my opinion, enlarging the constitutional grant by grafting upon its express terms a construction so lax and comprehensive as to be subversive of its limited character. The learned district attorney has referred to but a single clause (Art. 1, Sec. 8, Cl. 1) as conferring the authority now claimed, and that clause is wholly irrelevant. The "power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States" is quite distinct from the right to take private property for public use; and it is not the power of taxation, but the right of eminent domain, which is here asserted.

Government may, in time of war, appropriate or destroy private property. This is justified by "the necessities of war" (U. S. v. Pacific Rail-

road, 120 U. S., 234); but no deduction from this doctrine of the public law can be made and applied in time of peace, be the incentive what it may, without violation of "the supreme law of the land."

64 Entertaining these views, with which no judicial decision that has been brought to my notice conflicts, it is impossible for me to sustain these proceedings.

In the first case, the exceptions to which this opinion is applicable are sustained.

In the second case, the motion to quash is granted.

65 BUTLER, J. I regret that I can not unite in the above conclusion. I do not propose to enter upon an argument to sustain my views, but to state very briefly the reasons on which they are founded.

While the Government may take land for public use, the use must be such as arises out of the exercise of its legitimate functions. It is not necessary, however, that the land or the use be indispensible. It is sufficient if it be convenient and serviceable. Within this limitation Congress and the Executive cannot be controlled; they are the judges. The courts can only interfere where the limit is transcended. The Constitution does not define the special uses for which land may be taken; they could not be so defined; the occasion for them changes with the change of circumstances. As, for instance, the Government has the care and wardship of the Indian tribes. It must provide for them, protect its citizens against them, and keep the public peace in this respect. Of recent times it has come to be believed that this duty can best be discharged by teaching them the arts and industries of civilized life. The Government has adopted this view, and consequently established schools for the purpose. Schoolhouses have thus become necessary. In some instances Government buildings have been appropriated to this use, and in other buildings have

66 been rented. That land may be taken for the creation of such schoolhouses I cannot doubt.

The land may be taken for custom-houses, court-houses, post-offices, &c., is not now questioned, though it was formerly denied. Here the use is virtually indispensible. If, however, it were a convenience merely, which facilitated the discharge of the Government's duties, the right to take would be equally clear.

It is the duty of the Government to raise and maintain armies, and to fight battles when necessary. As a consequence, it is necessary to establish military schools, barracks, hospitals, &c. That land may be taken for these purposes is plain. It is absolutely necessary to a discharge of the duty. The right to take, however, is just as clear in the absence of such necessity, when the use aids the Government in this respect. If the construction of a railroad between the capital and the seaboard, or any other po'nt where none exists, should become a military necessity or a useful convenience in the discharge of these duties, by facilitating the transportation of troops or munitions of war, the Government might take land and construct it, without seeking for authority in any other constitutional provision. The power to raise and maintain armies imposes the duty of caring for its soldiers, promoting their welfare during life, and providing for decent burial (at least) after death, whether they die in battle or in time of peace. It may, therefore, do whatever is necessary to

these ends. Consequently it may establish hospitals, take land for
67 cemeteries, &c. It could not leave its dead to fester where they fall. To do so would not only outrage public decency, but would raise a serious obstacle to the discharge of its express duty—the maintenance of armies—by inclining men to avoid its services. It may erect monuments to commemorate special acts of heroism, and award pensions *fro* meritorious services, because these and similar acts directly and materially tend to aid it in discharging the duty stated.

The land described in the petition is adjacent to the Gettysburg National Cemetery. I cannot doubt that it might have been taken to enlarge and improve that property. How much is necessary to that purpose Congress and the Executive are judges of. This, however, is not the purpose named in the statute.

The land is required to carry out the provisions of the act of 1893, to wit: "For the purpose of preserving the lines of battles at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of the Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines and *and* for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend."

68 In my judgment this is a legitimate public use of the land. The battle was a great lesson in military science, the greatest ever taught on this continent, at least—a most important illustration in strategy and the art of war. That it may be fully understood and appreciated hereafter, it is necessary to do just what is proposed—preserve the battlefield in its original condition, mark the positions and movements of the troops, and the different arms of the service, at the various stages of the battle, so that it may be seen, as upon a great chart, precisely how the battle was fought. The Government proposes to perpetuate and secure this lesson for the sake of what it may teach to those who at present constitute its armies, as well as to those who will hereafter constitute them. In my judgment this is a legitimate purpose, and it can only be accomplished by taking the land. The power to take it is, I believe, embraced in the power to maintain armies and teach them military science.

I understand the very able counsel who opposes the proceeding to say that the Government should own the land, but should obtain it by purchase. If the Government should own the land it is because the Government has a legitimate use for it, otherwise it has no power to purchase, or even to accept it as a gift, and expend money for its improvement. But what authority can the Government take and hold land in trust for such purposes, unless they serve a legitimate public use, and especially expend money upon them? A concession that it may purchase, or accept the land as a donation, for the uses stated, seems to me to be plain
69 concession of the right to take. The Government has repeatedly accepted and improved lands for such uses, and the propriety of it has not even been questioned. It so accepted and improved the lands embraced in the Gettysburg National Cemetery and in the Chickamaqua and Chattanooga National Park, expending large sums of money on each.

Furthermore, this battlefield is of transcendent national interest. The ground is hallowed and made sacred by the blood shed upon it, at the most important epoch in the nation's history—in the supreme hour of its life. All right-minded men would say, I think, that it is fitting the nation should own and preserve it from desecration. It may be replied that this is mere sentiment. I think, however, it is something more; but if it is not, it is a most healthy sentiment, the encouragement of which directly tends to preserve the nation, and thus to aid the Government in discharging its highest duty. It may be said the same reasons require the ownership of all other important battlefields of the nation. I think not. If they do, however, the Government should own them for the sake of what they teach and the love of country which they inspire. I believe the other objections urged against the proceeding, as well as the exceptions to the report of the jury, should also be dismissed.

Filed April 22, 1895. Samuel Bell, clerk.

70 In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA, *vs.* A CERTAIN TRACT OF LAND (7 2-10 ACRES) situate in Adams County, Pennsylvania.	April sessions, 1894. No. 34.

And now, to wit, April 23rd, 1895, this case coming on to be heard on exceptions to the report of the viewers, and having been duly argued by counsel for the respective parties and fully considered by the court, it is ordered, adjudged, and decreed that the first and second exceptions filed by the defendant be sustained, and that the petition of the United States be, and the same is hereby, dismissed.

GEO. M. DALLAS, *Cir. J.*

71 In the circuit court of the United States, E. D. of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND CONTAINING 7 & 2/100 acres, situate in Adams County, Pennsylvania.	Apl. sess., 1894. No. 34.

The United States, plaintiff in the above-stated action, believing itself to be aggrieved by the final judgment and decree entered against it on the 23rd day of April, 1895, in the above-entitled proceedings, hereby prays for a writ of error to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which such final judgment and decree was entered, duly authenticated, may be sent to the Supreme Court of the United States.

ELLERY P. INGHAM,
Attorney for the United States.

April 29, 1895.

Allowed, April 29, 1895:

GEO. M. DALLAS,
Cir. Judge.

72 *Assignment of error.*

1st. The learned court erred in entering a judgment and decree sustaining any of the exceptions filed to the report of the jury of view on behalf of the Gettysburg Electric Railway Company.

2nd. The learned court erred in entering a judgment and decree sustaining the first exception filed to the report of the jury of view on behalf of the Gettysburg Electric Railway Company, said exception being as follows:

"I. The act of Congress approved August 1st, 1888, provides for the acquisition of real estate by the United States by condemnation only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, esq., United States attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the fifth paragraph thereof, belonging to the Gettysburg Electric Railway Company for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3rd, 1893, are not such public uses as authorized the condemnation by the United States of the real estate of private persons."

3rd. The learned court erred in entering a judgment and decree sustaining the second exception to the report of the jury of view on behalf of the Gettysburg Electric Railway Company, said exception being as follows:

73 "II. The purposes specified in the sixth paragraph of the said petition, namely, 'of preserving the lines of battle,' 'properly marking with tablets the positions occupied,' and 'determining the leading tactical position of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets,' are none of them public uses or purposes, authorizing the condemnation by the United States of private property."

4th. The learned court erred in entering a judgment and decree dismissing the petition of the United States.

5th. The learned court erred in not dismissing the exceptions filed on behalf of the Gettysburg Electric Railway Company.

74 UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, set.:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania, No. 34, April session, 1894, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 24th day of May, in the

year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) Case No. 15918. Term No. 1034. The United States, plaintiff in error, vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. E. Pennsylvania C. C. U. S. Filed May 25th, 1895.

year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) Case No. 15918. Term No. 1034. The United States, plaintiff in error, vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. E. Pennsylvania C. C. U. S. Filed May 25th, 1895.

Office Supreme Court U. S.
FILED.
DEC 20 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
A CERTAIN TRACT OF LAND IN CUMBERLAND TOWNSHIP, ADAMS COUNTY, STATE OF PENNSYLVANIA. } No. 599.

SAME
v
SAME. } No. 629.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
A CERTAIN TRACT OF LAND IN CUMBERLAND TOWNSHIP, ADAMS COUNTY, STATE OF PENNSYLVANIA. } No. 599.

SAME
v.
SAME. } No. 629.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases involve the same questions, and will be argued together. The proceeding below in each was a petition by the United States to appropriate to public use

portions of the Gettysburg battlefield; one, filed June 11, 1894, for 7.02 acres, and the other, filed January 21, 1895, for 3.12 acres. The Gettysburg Electric Railway Company, a corporation under the laws of Pennsylvania which claimed the property, answered, raising various questions, and also filed motions to quash the petitions. (Rec., p. 1.)

The motion to quash the petition in the first case, No. 629, was denied, without prejudice to any question thereby raised, the right to present which, upon the coming in of the report of the jury to be appointed (Rec., p. 15), was reserved. The jury fixed the value of the 7.02 acres proposed to be taken at $30,000, which sum it awarded to said railway company.

The railway company filed exceptions to the award of the jurors, raising, among others, the same questions as in its motion to quash, and appealed from such award to the circuit court of the United States for the eastern district of Pennsylvania. The United States also appealed from the report of the jury as to the value. (Rec., p. 26.) Subsequently the railway company filed two amendments to its answer, setting up alleged expenditures and contracts for expenditures from the appropriations (out of which compensation was to be made for the land sought to be taken), which it was alleged would exhaust said appropriations. (Rec., pp. 27, 28.) The case was submitted *on the exceptions of the railway company* to the report of the jury, which were sustained, and the petition dismissed. (Rec., p. 32.) For assignments of error by the United States, see Record, page 33.

No jury was appointed in the second case, but it was submitted on the motion to quash the petition, which

the court granted. Like amendments to answer were filed, as in No. 629, after the filing of the motion to quash. For assignments of error see Record, p. 18.

The action of the court was determined by Dallas, circuit judge—Butler, district judge, dissenting. The opinions of both will be found at the end of each record.

The question involved relates to the right of the United States to take the land in question under its power of eminent domain. Each case depends upon the sufficiency of the petitions, which were the same except in the description of land. (Each Record, p. 2.) No question is raised as to the sufficiency of the averments of the petition, except that the acts and resolutions of Congress therein set out do not create the right to appropriate the property. The first is the appropriation act of March 3, 1893 (27 Stat., 599), which provided money among other things for—

> Monuments and tablets at Gettysburg: For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War.

The second is the joint resolution approved June 6, 1894 (28 Stat., 584), entitled "Joint resolution authorizing the purchase or condemnation of land in the vicinity of Gettysburg, Pennsylvania," which provided that—

> Whereas Congress appropriated by the Act of March third, eighteen hundred and ninety-three, the sum of twenty-five thousand dollars to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia, on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading technical positions of both armies; and
>
> Whereas an appropriation for the further sum of fifty thousand dollars is now under consideration by Congress for like purposes which has passed the House of Representatives during the present session and is now pending in the Senate; and
>
> Whereas it has been recently decided by the United States court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the War Department to execute the purposes declared in the act aforesaid; and
>
> Whereas there is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the Act of March third, eighteen hundred and ninety-three: Therefore be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of War is authorized to acquire by purchase (or by condemnation) pur-

> suant to the Act of August first, eighteen hundred and eighty-eight, such lands or interest in lands, upon, or in the vicinity of said battlefield, as, in the judgment of the Secretary of War, may be necessary for the complete execution of the Act of March third, eighteen hundred and ninety-three: *Provided*, That no obligation or liability upon the part of the Government shall be incurred under this Resolution nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress.

If the first act proves to be inadequate it is competent to aid it by subsequent acts. Lewis on Em. Domain, sec. 452.

The appropriation act of August 18, 1894 (28 Stat., 405), contained the following:

> For continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania, and for purchasing, opening, constructing, and improving avenues along the portions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the Secretary of War may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure; fifty thousand dollars, to be expended under the direction of the Secretary of War.

> And the Secretary of War is hereby authorized to accept on behalf of the United States donations of land for road or other purposes.

The petitions averred the necessity, in order to carry out the purposes of said act of March 3, 1893, of acquiring the title in fee simple to the tract of land described, then owned by the Gettysburg Electric Railway Company; that the Secretary of War had duly made application to the Attorney-General, according to the provisions of the act of Congress of August 1, 1888, to cause proceedings to be instituted for the condemnation of said tract, and that no agreement could be made for its purchase. The act of August 1, 1888 (25 Stat., 357), is as follows:

> That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.
>
> SEC. 2. The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions

> of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

The chief point relied on by opposing counsel, and the only one upon which the circuit judge based his dismissal of the petition, is that Congress has no authority to direct the appropriation of private property for the purposes named.

If this court shall hold that such an appropriation is not within the power of Congress, it will not be necessary to consider any of the minor questions raised. If it shall hold that Congress has such authority, we think a reversal must be ordered without regard to such minor questions.

ARGUMENT.

I.

IT WAS WITHIN THE POWER OF CONGRESS TO DIRECT THE APPROPRIATION OF THE LAND IN QUESTION FOR THE PURPOSES NAMED.

The General Government possesses the power of eminent domain as incident to its sovereignty, although such power is not expressly given by the Constitution. (*Kohl* v. *United States*, 91 U. S., 367; *United States* v. *Jones*, 109 U. S., 513, 518; *Cherokee Nation* v. *Kansas Railway Company*, 135 U. S., 641, 656.)

By the fifth amendment to the Constitution, providing that private property shall not be taken for public use

without just compensation, the existence of the power in the Federal Government was recognized. The amendment was a mere limitation upon the power. (*United States* v. *Jones*, 109 U. S., 513.)

In the decisions heretofore rendered by this court there has been no attempt to state a general rule by which it may be determined whether or not the power of eminent domain may be exercised. The instances of the exercise of the power considered in them were clearly referable to some of the great substantive powers expressly named in the Constitution, and were sustained on that ground. As said by Mr. Justice Harlan in the Cherokee Nation Case, *supra*, at page 657, the General Government has authority to take the lands of private owners, everywhere within the geographical limits of the United States, for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

In addition to being a power inherent in the United States as a sovereignty, the power of eminent domain may properly be said to be contained in the unenumerated powers included in the authority given by the eighteenth paragraph of section 8 of Article I of the Constitution, "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the Government of the United States, or in any Department or officer thereof."

In the effort to maintain that the right of the Federal Government to exercise the power of eminent domain in

the case now under review does not exist, our opponents and the circuit judge have given to the Constitution an extremely narrow and restricted construction, a practice which was deprecated by Chief Justice Marshall in what has always been considered, and was recently pronounced by this court in the income-tax cases, "one of his greatest judgments," *McCulloch* v. *Maryland*, 4 Wheat., 316, 407.

In the opinion in the *Legal Tender Cases* (12 Wall., 533), Mr. Justice Strong maintained that the clause in question gave the Government the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. What he further said (p. 534) is peculiarly applicable to the case at bar:

> It is to be observed it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions.

If we pursue here the course so described we may properly contend that as it was the design of the Constitution to make of the Government thereby created a nation for Federal purposes, and as that nation is intrusted by the very terms of the instrument with the promotion of the "general welfare," which the preamble recites as one

of the objects of its creation, it possesses the right not only to employ the means necessary for its preservation, but is also, in the fullest sense, invested with authority to perform whatever duties it may owe to others, whether dependent upon contract or upon considerations of national honor and gratitude. For it can not be controverted that the performance of national duties conduces to the national welfare, whether they arise from strictly legal demands or proceed from those generally acknowledged considerations which oblige though they do not bind. Authority for the performance of all such duties is within the scope of the various powers expressly delegated to Congress, and is appropriate to be exercised when it does not encroach upon the powers which are reserved to the States.

The nature of the National Government is thus described by Chief Justice Marshall in *United States* v. *Maurice* (2 Brock, 96), at page 109, in a passage quoted by Mr. Justice Gray, in *Van Brocklin* v. *Tennessee* (117 U. S., 154):

> The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institution.

In the recent decision of this court in the case of *In re Debs* (158 U. S., 564), this doctrine was reiterated with emphasis.

It is submitted, that the power to acquire the land in question exists by virtue of the first paragraph of section 8, Article I of the Constitution, by which Congress was authorized to collect and consequently to expend the public moneys, not only in paying the debts of the United States, but in providing for "the general welfare of the United States." It follows, as a necessary consequence, that as the power of eminent domain is simply a means to an end, a mode by which land appropriate for the purposes of the Government may be acquired, the power so to acquire it exists if the Government might rightfully obtain it by direct purchase.

As said by Mr. Justice Gray in *Cole* v. *La Grange* (113 U. S. 1, 8):

> So far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends.

See also the cases cited at page 8 of the report of the case last cited, in which the court has established the doctrine that where a use is public, so as to justify the exercise of the power of eminent domain, it is equally public for the exercise of the taxing power.

In *Olcott* v. *Supervisors* (16 Wall., 678) it was held (p. 689) that "nobody doubts that the taxing power of a State extends no further than to raise money for a public

use, as distinguished from private, or to accomplish some end public in its nature."

In *People* v. *Smith* (21 N. Y., 595) Judge Denio said (p. 598):

> The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the lawmaking power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use.

That the taking must be for public and not for private use is, of course, involved in the very definition of the power of eminent domain; and therefore the question whether the proposed use is one of the class of uses for which the power of eminent domain may be exercised may always be raised by the owner of the property which it is proposed to take. But courts will be controlled by the declaration of the legislature that there is a public necessity for the taking, unless it manifestly appear by the provisions of the act that the use for which the property is to be taken is one in which no public interest is or can be involved. (*Welton* v. *Dickson*, 38

Neb., 767; Cooley, Const. Lim. (6th ed.) p. 662; 2 Dill. Mun. Corp., sec. 465.)

"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." (*Boom Co.* v. *Patterson*, 98 U. S., 403, 406.) The determination of what private property is needed for public purposes is a question of a political and legislative character. (*Monongahela Nav. Co.* v. *United States*, 148 U. S., 327.)

So, also, it has been held that when the use to which it is intended to devote land, the property of private individuals, is public, Congress may confer upon the head of a Department power to acquire, in his discretion, such quantity of land as he may deem necessary for the use in question. (*Kohl* v. *United States*, 91 U. S., 367.) And see note 4, page 663, Cooley Const. Lim. (6th ed.).

It is manifest that the use must be either public or private. By a well-settled rule the act of Congress will not be held invalid unless it clearly appear that the alleged public use is pretended and the real use a private one to which Congress has wrongfully lent its aid. Mr. Dillon succinctly puts the proposition, as applied to legislatures generally, in the following language, citing many authorities which it is not necessary here to review:

> If the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation. (2 Dill. Mun. Corp., sec. 465.)

On the question of what is a public use see *Appeal of Rees*, 12 Atl. Rep., 427, where the views expressed in a master's report holding valid a condemnation of land for the Pittsburg Exposition Society were adopted by the court.

> A public use is where Government is supplying its own needs, or furnishing facilities for its citizens as to matters of public necessity, convenience, *or welfare*, which, from their peculiar character, or the difficulty of providing for them otherwise, it is useful for the Government to provide. (Cooley, Const. Lim., 6th ed., 655.)

It was upon the ground that the expenditure conduced to the "public welfare" that aid was extended by Congress to the Philadelphia Centennial Exposition and the World's Columbian Exposition.

It is not necessary that the proposed exercise of power shall be *essential* to the functions of Government; it need only be *convenient* and adapted to promoting the ends for which the General Government was established. (*Legal Tender Cases*, 12 Wall., 538 *et seq.*)

Judge Cooley further says, in support of the proposition that the proper department to determine what should and what should not constitute a public burden is the legislative department,

> And in determining this question, the legislature can not be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely

> on considerations of honor, gratitude, or charity. The officers of government must be paid, the laws printed, roads constructed, and public buildings erected; but, with a view to the general well-being of society, it may also be important that the children of the State should be educated, the poor kept from starvation, losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of state policy are addressed must be accepted as conclusive. (Const. Lim., 6th ed., p. 600.)

Opposing counsel and the circuit judge in the court below applied to the Government of the United States the same close construction which they would apply to an ordinary corporation. They therefore apparently sought to find in the Constitution some clause conferring upon Congress the right to acquire, preserve, and mark battlefields, and build roads through them, and, not finding any which appeared to have been drawn with such object directly in view, concluded that the right does not exist. The mistake was simply in forgetting that the Constitution contains rather an enumeration of the general subjects for the exercise of governmental power which are committed to Congress than a description of the exact nature and extent of the powers themselves or the mode of their exercise. *It is more accurate to describe the United States as a Government of restricted scope than as one of limited powers.*

If, therefore, the proposed taking of land, being directly by and for the Government alone, could have, or be fairly thought by Congress to have, any possible direct and immediate relation to any of the subjects of governmental action which are committed to Congress, it is not open to the courts to question the necessity or propriety of the appropriation. (*Shoemaker* v. *United States*, 147 U. S., 282.) Judicial authority is exhausted when the question of public use is decided. (*Id.*, 298.) The question would be different if the taking were by, or the use primarily for, private persons or corporations, with only an alleged indirect or resulting benefit to the public.

If the United States might lawfully acquire the land by purchase, or levy and expend taxes for its care and maintenance if acquired by gift, which could only be done in case the proposed use of the land might in some way, in the judgment of Congress, advance some public interest committed to its care, they may by the same token take the land by the exercise of the power of eminent domain. For whatever differences may exist between that power and the power of taxation, it is submitted that, as each must be only for some public use, the classification of objects is the same as to both. (See Cooley Const. Lim., 6th ed., p. 153, and I Hare Am. Const. Law, p. 337.)

It has been common in all ages to preserve battlefields and mark them in some appropriate way. The ground whereon great conflicts have taken place, especially those where great interests or principles were at stake, becomes at once of so much public interest that its preservation

is essentially a matter of public concern. The prevention of such uses as would either profane the ground or destroy its topography is necessarily a matter of public rather than of private concern. The owner can not be expected to give up the land, although it is already dedicated in the broader sense, as President Lincoln said in his address at Gettysburg, and has now been dedicated a third time by the assembling there of the survivors on both sides to designate the lines where they once met in deadly conflict. Therefore the duty of acquiring and preserving it rests on the public, and the only organized form of the public for such purpose is the Government itself.

If ours were an ordinary form of government, the right of Congress to acquire this property for the purposes named would hardly be doubted; and the only question which really arises now is whether the right has fallen to the National Government in the distribution of powers.

In seeking to ascertain the objects which influenced Congress in providing for the acquisition of this land, it is to be kept in mind that—

> It is not necessary that an act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution. (*Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S., 657.)

It is manifest that interest in preserving historic spots is naturally in the Government whose welfare is involved in the ideas and principles which have come to have there the local name and habitation so essential to their

preservation and perpetuation. It is the national idea and the principle of the indissolubility of the Union which Gettysburg embodies. The National Government therefore, rather than that of any State, is interested here. The power to tax to enable it to "provide for the * * * common defense and general welfare of the United States" (sec. 8, Art. I) necessarily implies the right to make any provision which Congress may deem wise for such defense and welfare, and to expend therefor the taxes so laid and collected. It might erect a monument to perpetuate the remembrance of the peril and triumph of the principle on which the Union is founded. It might, therefore, condemn land on which to place the monument. By the same right it may acquire and preserve the battlefield itself as the best possible monument.

Means to keep alive the martial spirit are necessarily within the power of every government which has the right to declare war, especially where its policy requires it to depend upon citizen rather than regular soldiery. This right was assigned to the National Government, and to it alone. Congress may "declare war," "raise and support armies," "make rules for the government and regulation of the land and naval forces," "provide for organizing, arming, and disciplining the militia," and for "calling forth the militia." (*Id.*) Is it open to doubt that the preservation of the battlefield of Gettysburg, so that for all time it may be visited, will tend to keep alive the martial spirit of the people, and that the marking of lines of battle and important positions will aid the memory and imagination of those who visit it?

How, save by the same necessary implication from the powers above mentioned and under the express authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (*Id.*), does the Government derive the right to establish and maintain military schools, with undoubted power of eminent domain as well as of taxation therefor? The battlefield may be taken and preserved, and the positions of the opposing forces marked, in order that the pupils in such schools may be instructed. But if this instruction be not given, is not the preservation of the field for those who may choose to visit or study it a means of a more general military education?

The probable or possible practical benefits to the National Government in the various ways already suggested suffice to bring the question of appropriating this land into the class of questions which Congress has sole power to determine. But if, as contended, the only possible object were sentimental, it alone would suffice. A government would be short lived which should overlook or affect to despise the power of sentiment. The patriotic feeling which would be fostered by rescuing this historic ground from neglect or even from common uses, and which would be shocked by failure or refusal to do so, is one of the great forces of the Republic. To foster this feeling is one of the means of promoting "the general welfare," and providing for "the common defense" as well. This, of course, means the welfare of the nation in the broad Federal sense as opposed to welfare with respect to matters left to the care of the States, and the defense of national interests and honor.

When Congress declares the necessity of taking property for such public and patriotic uses only, it is absurd to cite cases involving the taking of land for merely private uses. The only question can be whether the use is one which comes within the powers of the United States or within those of the States.

The extent to which the argument of opposing counsel necessarily leads is shown by the assertion in the briefs below that "it can not be pretended that the Government could condemn land for the purpose of making a cemetery for the purpose of burying the soldiers who fell at Gettysburg" (p. 9), yet this court distinctly recognized such right in the opinion rendered in the *Arlington Case* (106 U. S., p. 22.) By the *Act of February 22, 1867*, chapter 61 (14 Stat., 399), the Secretary of War is authorized to do this very thing, and under that act cemeteries have been acquired in various places, both North and South.

Condemnation of land was made, under the *Act of August 18, 1890*, chapter 806 (26 Stat., 333), for the marking and preservation of the fields of Chattanooga and Chickamauga. (See 19 Opinions of Attorneys-General, p. 673.)

In the exercise of the powers conferred by the Constitution to declare war, suppress insurrection, and raise armies, Congress, directly or indirectly, provided large armies for the defense of the Union, and, as incidental and germane to the exercise of that power, during the war it provided hospitals for the sick and wounded soldiers, graves for the dead of both armies, and since the

close of the civil strife has not only given largely of its bounty to its disabled heroes, in the form of pensions, but has acquired in various parts of the country large tracts of land where it has erected and maintains homes for disabled veterans. No one has ever presumed to question that expenditure of the public moneys for such purposes, or the contributions of the Government toward the Centennial and World's Columbian Expositions, or the expenditures connected with the recent presence at the opening of the Kiel Canal of vessels of the United States Navy, were not proper national disbursements. And, surely, if the acquirement of land for soldiers' homes by the use of the money obtained from taxpayers is a proper exercise of the taxing power, such an intended use would not cease to be a public one because of the necessity for a compulsory taking of land required for the purpose.

Out of the sacrifices made by the soldiers of the Union, living and dead, for the preservation of the Union of the States arose the moral obligation and public duty to provide for the needs of the living and the decent interment and repose of the dead. If to the victorious general a monument may be erected at the public expense, by the same right the battlefield may be acquired and preserved as a monument to the soldiers of his army.

As to pensions, this court said in *Walton* v. *Cotton* (19 How., 355):

> Pensions are the bounty of the Government, which Congress has the right to give, withhold, distribute, or recall at its discretion.

In *Daggett* v. *Colgan* (92 Cal., 53) the claim was made that an act of the legislature of the State of California appropriating $300,000 to meet the expenses of erecting buildings and maintaining an exhibit of the products of the State at the World's Columbian Exposition, to be expended and disbursed under the charge and control of a commission appointed by the governor, was in conflict with a clause of the constitution which forbade the appropriation of money to any institution not under the exclusive management and control of the State as a State institution. The supreme court of the State, however, held the contention unfounded, decided that the object of the statute was to promote what was assumed to be a matter of public concern, for the public good; that the State possessed the power to appropriate funds for the celebration of the anniversary of important events in the history of the country; that the act in question made an appropriation for a public use; and that the maintenance of an exhibition of the products of the State fell within the legitimate authority of the State government.

As to expenditures of the character of that then under consideration and the possibility that the power to authorize such expenditures might be abused the court said (p. 59):

> Such expenditures are justified under the general power which the state has to provide for the public welfare, the limits of which are perhaps not capable of exact definition, and are the same in principle as appropriations made for the building of monuments to commemorate great historical events, or for erection in public places of the statues of those who by

common consent are classed among the patriots or benefactors of the nation.

Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence. The only protection against reckless and improvident appropriations for public purposes must be found in the character of those intrusted with the power of legislation, and in the integrity and firmness of the chief executive of the State.

In *Hilbish* v. *Catherman* (64 Pa. St., 154) the claim was made that an act of the general assembly was unconstitutional which authorized school directors to repay to certain individuals subscriptions made by them for bounties to be paid to volunteers in the civil war.

The court said (p. 159):

> We can not declare this act unconstitutional unless we can say, in the language of Judge Tilghman, that "its violation of the constitution is so manifest as to leave no reasonable doubt" (*Com.* v. *Smith*, 4 Binn., 123); or, in the language of many federal and state judges, that it violates the constitution so clearly, palpably, plainly, as to leave no doubt or hesitation in our minds (*Sharpless* v. *Philada.*, 9 Harris, 164); or unless we can deny that *a tax law must be considered valid, unless it be for a purpose in which the community has palpably no interest* (*Id.*, 168). How can we say this, unless we hold that many hundred laws on our statute book, never heretofore questioned, are void, granting pensions and gratuities for past services, swords, medals, and mementos for illustrious public actions, rewards for useful arts, donations to fire companies, agricultural societies, colleges and schools, imposing taxes to pay for property destroyed by mobs, and many other matters which will occur to everyone.

So, in *Dexter* v. *Raine, auditor* (18 Week. Law Bull. (Ohio), 61), it was sought to restrain the levy of a tax by the commissioners and auditor of Hamilton County, Ohio, for the purpose of erecting a monument to the memory of William Henry Harrison, one ground being that the act of the general assembly authorizing the same was unconstitutional.

The general term of the superior court of Cincinnati (one of the judges being Hon. William H. Taft, since then Solicitor-General of the United States and now a judge of the United States circuit court of appeals) held:

> We are of opinion that the purpose for which the tax under the act is to be levied is a public purpose. The erection of a monument in honor of a man who has rendered valuable services to his country is an enduring acknowledgment of the country's gratitude, which will be a strong incentive to patriotic service by other citizens. (Cooley Const. Lim. (6th ed.), p. 600; Burrough on Taxation, p. 20.)
>
> The custom of erecting such monuments at public expense is so well established in our country, in England, and in nearly all other civilized countries, that it tends to support the proposition that an expenditure of that sort is made for a public purpose. The argument that such a power is liable to abuse is hardly sufficient to show that it does not exist, and the remedy for any such abuse, as in other cases of abuse of legislative power, lies within the legislature itself, or with the people, rather than with the judiciary.

On October 18, 1887, the judgment of the superior court was affirmed by the supreme court of the State without opinion. (*Ib.*, 301.)

Again, in *Booth* v. *Woodbury* (32 Conn., 118, 128), a case where the validity of a State law confirming township action which granted gratuities to persons enlisting in the military service of the United States was questioned, the court in assigning reasons in support of such action said:

> Second. If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice; and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as to indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned.

We therefore contend that where, as here, the object is not to take private property and give it or its use to a person or corporation for what are really private purposes; where the land is not to be acquired for the benefit of a particular State, but solely for the preservation of a historic spot as a perpetual monument to those who there lost or risked their lives, to be directly controlled by the General Government and remain forever the property of the people of the whole country for their instruction and patriotic inspiration, the use is clearly public, and therefore an appropriate one for the exercise of the power of eminent domain.

II.

CONGRESS CLEARLY DELEGATED TO THE SECRETARY OF WAR POWER TO ACQUIRE THIS LAND.

It is to be inferred from the brief of opposing counsel in the lower court that they do not deny the power of the Government to take this land from the possession of the railway company if the use be a public one, but the contention seems to be that it does not clearly appear from the act and joint resolution that it was the *intention* of Congress to authorize interference with the use of any of the land by a railway company.

That corporations hold their franchises subject to the right of eminent domain is well settled. (*Monongahela Nav. Co.* v. *United States*, 148 U. S., 312, 341; *Richmond, F. and P. R. R. Co.* v. *Louisa R. R. Co.*, 13 How., 83; *West River Bridge Co.* v. *Dix*, 6 How., 507; *In re City of Brooklyn* (Ct. App. N. Y., Nov. 27, 1894), 38 N. E., 983; *President, etc., B. and F. T. Road* v. *Balt., C. and E. M. P. R. Co.* (Ct. App. Md., April 19, 1895), 31 Atl., 854; *Lock Haven Bridge Co.* v. *Clinton County*, 157 Pa. S., 379.)

The intention to grant such right may be inferred even in favor of bodies to which the power of eminent domain is merely delegated.

In *Springfield* v. *R. R. Co.* (4 Cush., 63) the court say:

> When it is the intention of the legislature to grant a power to take land already appropriated to another public use, such an intention must be shown by express words, or by necessary implication. There may be such a necessary implication. Every grant of

> power is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as are requisite to its exercise.

So in *Kohl* v. *United States* (91 U. S.), the selection or determination of the land suitable to be taken to carry out the purposes intended by Congress was committed to one of its own agents.

The case at bar is wholly unlike that of a legislative act authorizing the construction of a railway, whose route is only defined as running between two designated termini with choice of routes. In such case it is clear that authority could not be implied so to lay out the line as to destroy a prior public use. But in the case at bar, keeping in mind the purpose for which the appropriation was intended to be made, the necessity was evident for exclusive possession in or control by the Government of land in a particular locality and of limited area, which, in the judgment of the Secretary of War, might be deemed necessary for the complete execution of the act of March 3, 1893. When, therefore, the Secretary of War was "authorized to acquire by purchase (or by condemnation) pursuant to the act of August 1, 1888, such lands or interest in lands upon or in the vicinity of said battlefield as, in the judgment of the Secretary of War, may be necessary for the complete execution of the act of March 3, 1893," it was clearly implied that any public uses to which the land deemed necessary by him to be taken might theretofore have been appropriated by private individuals or corporations should give way to the higher and necessarily *exclusive* public use intended by Congress.

There was no merit, therefore, in the exception of the railway company nor in the ground of its motion to quash, in the court below, that—

> Neither the act of Congress approved August 1, 1888, nor the act approved March 3, 1893, nor the joint resolution approved June 6, 1894, was intended to authorize the Secretary of War to procure for the United States by condemnation any land which had already been devoted to a public use.

If the taking of the land—the tangible property—destroys or impairs a franchise, this can only increase the damages. (*Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 343.) So, if taking part affects the remainder.

The numerous cases upon this branch of the case cited in the brief submitted to the lower court were all cases where one corporation attempted to condemn the property of another. The question in all of them was not whether the State had the power to condemn, but whether the State had granted that power to the corporation seeking to exercise it. They involved, substantially, the proposition recently decided by the Supreme Court of Indiana in *Cincinnati Py. Co.* v. *City of Anderson* (38 N. E., 167, 169), that under a *general* law permitting a municipality to establish streets, it could not lay out a street across the right of way of a railroad so as materially to injure or destroy the prior public use. It was held that *express* legislative sanction was essential in such a case to the accomplishment of such a result.

The specific property to be taken here is designated. It is not contended that any railway had been built

thereon when Congress first ordered the condemnation. The proposed use of the property for a railway is mentioned in the resolution of June 6, 1894.

The question finally resolves itself into this, whether the United States Government, in seeking to preserve the field of Gettysburg and secure the repose of the dead who there sleep, can be thwarted by a trolley railroad. The Government should not even be required to pay for an alleged franchise under the circumstances. *Volenti non fit injuria.*

It is quite apparent, too, from the description of this railway (Rec., pp. 8, 9), that it is a purely private and not a public corporation by the very test which counsel have furnished in the *Niagara Falls and Whirlpool Railway Case* (108 N. Y., 375). The court there found that there was "no traffic or business of the road except in conveying visitors to the falls over the road and to see the whirlpool;" and held that the "proposed road was not a highway in any proper or just sense of that term, and that therefore the use was not a public use," etc.

The sole object of the defendant railroad company was to convey visitors to and over the battlefield of Gettysburg.

The Gettysburg Electric Railway Company was incorporated under the act of May 14, 1889, P. S. 211 (Rec., p. 8), as a street railway, with power "to hold, purchase, and convey, subject to existing laws, such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in the articles of incorporation."

The purpose of the incorporation is that "of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, or to be extended, under any existing charter, with the privilege of occupying so much of any street used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers by any other power other than by locomotive."

The powers are still further limited, as follows:

> No street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough, or township without the consent of the local authorities thereon; nor shall any street passenger railway be incorporated thereunder which shall not have a contiguous route from the beginning to the end, forming a complete circuit with its own track, excepting the 500 feet used under section 14 hereof.
>
> The attempt now being made to convert these city conveniences (street railways) into long lines of transportation, connecting widely separated cities and towns by electric railways, traversing country roads, was not anticipated or provided for by the legislature. The failure to confer upon these companies the power of eminent domain would, if it stood alone, be sufficient to justify this conclusion. (*Penn. R. R.* v. *Montgomery Co. Pas. Ry.*, 167 Pa. St., 62, 70.)

In that case it was held that while city and borough authorities could grant to such a railway the right to occupy streets and roads, township authorities had no power to bind private property or subject it to a servi-

tude for the benefit of anyone but the township and the public, so that the consent of abutting landowners was necessary.

It was further held that as such a company can not construct its road without the consent of the cities, boroughs, or townships through which it passes, it can not begin the construction until it has the consent of every such city, borough, or township.

In *Rahn Township* v. *Street Ry.* (167 Pa. St., 84, 90) the court below had suggested, but not decided, the question whether a company incorporated under this act could locate its road partly on the highways and partly on the lands of persons who have given their consent. Williams, J., in delivering the opinion of the court, said, although confessedly *obiter:*

> Street railways are railways on and along the streets of a city or town. They must conform to the grades of the streets they occupy. They may diverge for a short distance where the conformation of the surface or the position of streams make it necessary in order to avoid discomfort or danger to the traveling public, but that a street railway may, like a steam railway, locate its route not for the accommodation of local travel along the highways, but to reduce time and distance for passengers traveling from city to city or town to town across the country, is a proposition not to be entertained. It involves a perversion of the character and object of street railways.

So it would seem that the Gettysburg Electric Railway is not such a corporation that its property can not be taken for public use even by another corporation under condemnation proceedings, without the express inten-

tion of the legislature. And it may well be doubted whether it has any such corporate rights and franchises as should be considered by the court in determining the true value of the land to be taken by the United States for the public uses ascertained and determined by Congress.

III.

THE ACT AND JOINT RESOLUTION SUFFICIENTLY PROVIDE FOR COMPENSATION. EVEN IF THEY DID NOT THE DISMISSAL OF THE PROCEEDINGS WAS ERRONEOUS—THE COURT SHOULD MERELY HAVE PROTECTED THE OWNER'S OCCUPANCY UNTIL SUCH PROVISION WAS MADE.

The question raised by the amendments to the answers concerning the alleged exhaustion of the appropriations out of which payment for the land to be condemned is to be made, seems to us irrelevant here. The amendments to the answers were filed after the filing of exceptions and the motions on which the petitions were dismissed, and were not considered upon the hearing below. But the question will be now briefly considered.

The claim is that the amounts already appropriated by Congress for this object have already been absorbed by contracts made under the authority of the Secretary of War,—

> So that there is not, in point of fact, at this time any part of either of the said appropriations available for the purpose of paying and discharging any judgment which may be recovered by the respondent in this proceeding. (Brief for Respondent in circuit court.)

The amount ascertained by the jury as the just compensation was $30,000. The aggregate of the two appropriations was $75,000. But it is said the $75,000 has already been expended. There is nothing in the record to warrant this assertion. It appears as an affirmative allegation in the answer of the railroad company to the petition of the United States, but no proof offered in its support.

It is further insisted that, assuming appropriations already made to have been expended, no sure and certain provision is made for obtaining compensation as required by the Constitution, and counsel refer to Lewis on Eminent Domain, section 457, and cases cited in the notes relied on.

In *Cherokee Nation* v. *Kansas Railway Co.* (135 U. S., 659) this court said:

> The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty.

Judge Cooley, in his Constitutional Limitations, sixth edition, page 692, says:

> When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the

validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it.

In *United States* v. *Manderson's Extrs.* (3 U. S. Appeals, 205), the court, in referring to the act of August 1, 1888, said:

> But these laws were enacted subject to the constitutional restriction that private property shall not be taken for public use without compensation. Congress intended that compensation should follow the condemnation proceedings in every case, and the omission to make an appropriation in advance to pay the damages assessed for taking the property constitutes no bar to such proceedings, *for the faith of the Government is always a guaranty for that payment.*

In *Great Falls Manufacturing Co.* v. *United States* (124 U. S., 599) this court said:

> It is to be assumed that the United States is incapable of bad faith, *and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has been ascertained in the mode prescribed.* * * *

And on page 600:

> Upon the case as presented to us, and without intending to express doubt as to the constitutionality of the act of July 15, 1882, we are of the opinion that there is no obstacle in the way of the plaintiffs securing, by means of its suit in the Court of Claims, and without unreasonable delay, just compensation for all its property taken for the public use indicated in the act of Congress.

So that even had Congress made no provision whatever for the compensation, and had the property been actually taken for public use under authority of the act of Congress, yet "the faith of the Government is always guaranty for the payment," and the right of resort to the Court of Claims secures to the claimant, without unreasonable delay, just compensation for all the property taken for public use.

But here, as we have seen, all the legislation, general and special, provides for proceedings for the condemnation of the land. This imports the ascertainment of the amount of the compensation by an impartial tribunal and the imposition by the court of terms as to provision for payment of the amount before the occupancy of the land owner is disturbed. The United States, having invoked the jurisdiction of the court, must submit to it. There can be no *taking* of the land under such proceedings without the owner's consent until payment of the amount ascertained as compensation is made or provided for. But in case of a specific piece of property for an especial purpose for which there is no general appropriation, how can an actual appropriation be made ..til the amount required is ascertained?

Mere selection of the land and institution of proceedings to ascertain damages is not a *taking* which must be preceded by payment. (*United States* v. *O. R. and Nav. Co.*, 16 F. R., 524; *Standish* v. *Mayor etc.*, 15 Law and Eq., 255; *Fox* v. *Western P. R. R. Co.*, 31 Cal., 538; *Bloodgood* v. *M. and N. R. R. Co.*, 18 Wend., 9.)

It is insisted, however, that the effect of the *proviso* to the joint resolution of June 5, 1894—

> That no obligation or liability upon the part of the Government shall be incurred under this resolution, nor any expenditure made, except out of appropriations already made and to be made during the present session of Congress—

is to prevent the condemnation of more land than can be paid for out of the appropriations already or thereafter made during that session. But this view can not be sustained. The resolution contemplated the acquisition of land by "purchase," as well as by condemnation. The most which can be claimed is that the intention was that no more should be *purchased* than the appropriations would pay for, and that no land or property should be actually *taken* under condemnation proceedings beyond what the amounts appropriated would pay for, so as to impose obligations or liabilities on the Government beyond such amounts. Certainly no such obligation or liability had been incurred up to the time the petitions were dismissed.

When Congress makes a large appropriation to pay for lands to be taken, whose value can then only be estimated, it is a useless hampering of the Government by its own courts to dismiss the condemnation proceedings because the amount which may be or actually is awarded the owner exceeds the expectation of Congress. The right of the Government to carry on the proceedings must be determined by the situation when they are commenced. If such right then exists it can not be lost by the result of the proceedings themselves. This involves

a manifest absurdity. The utmost result of an award in excess of the existing appropriation would be the withholding of final judgment or a stay of process for possession until further provision for payment should be made.

A similar limitation of the amount to be expended was held not to invalidate condemnation proceedings in *Shoemaker* v. *United States*, 147 U. S., 282, 302.

The judgments dismissing the petitions should be reversed and the court below directed to proceed as prayed.

Respectfully submitted.

JUDSON HARMON,
Attorney-General.
HOLMES CONRAD,
Solicitor-General.

DECEMBER 18, 1895.

Office Supreme Court U.
FILED.
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JAMES H. McKENNEY,
CLERK.

Nos. 599 and 629. October Term, 1895.

IN THE

Supreme Court of the United States.

The United States, Plaintiff in Error,

vs.

A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania.

Same *vs.* Same.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for the Gettysburg Electric Railway Company, Respondent below and Defendant in Error.

CHARLES HEEBNER,
THOMAS HART, JR.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

The United States, Plaintiff in Error, vs. *A Certain Tract of Land in Cumberland Township, Adams County, State of Pennsylvania.*	October Term, 1895. No. 599.
Same vs. *Same.*	October Term, 1895. No. 629.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief for the Gettysburg Electric Railway Company, Respondent Below and Defendant in Error.

I. ABSTRACT OF PROCEEDINGS.

The main case, which is No. 629 (Transcript of Record, October, 1894, No. 1034), will be alone referred to. The petition in the other case, No. 599 (Transcript of Record, October, 1894, No. 999), was not filed until January 21st, 1895. The proceedings in the latter did not go beyond the

motion to quash. Precisely the same questions are raised in both cases.

June 11th, 1894, Petition of United States filed setting out: (1) The act of Congress of August 1st, 1888, referring to condemnation of land; (2) the act of Assembly of Pennsylvania of June 8th, 1874; (3) the act of Congress of March 3d, 1893, the sundry civil appropriation act for the year ending June 30th, 1894, providing, *inter alia*, as follows:—

"Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for the opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of $25,000, to be expended under the direction of the Secretary of War."

4. The joint resolution of Congress of June 6th, 1894, providing as follows:—

"WHEREAS, Congress appropriated, by the act of March 3d, 1893, the sum of $25,000 to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading tactical positions of both armies;

"AND WHEREAS, An appropriation for the further sum of $50,000 is now under consideration by Congress for like purposes, which has passed the House of Representatives during the present session and is now pending in the Senate;

"AND WHEREAS, It has been recently decided by the United States Court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the War Department to execute the purposes declared in the act aforesaid;

"AND WHEREAS, There is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March 3d, 1893: Therefore, be it

"*Resolved*, By the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is authorized to acquire by purchase (or by condemnation), pursuant to the act of August 1st, 1888, such lands, or interest in lands, upon or in the vicinity of said battlefield, as in the judgment of the Secretary of War, may be necessary for the complete execution of the act of March 3d, 1893: *Provided*, That no obligation or liability upon the part of the Government shall be incurred under this resolution, nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress."

5. That in order to carry out the purposes of the act of March 3d, 1893, it was necessary to acquire a tract of land in Cumberland Township, Adams County, Pennsylvania, owned by the Gettysburg Electric Railroad Company, shown by a blue print attached and described.

6. That the said tract includes many important tactical positions occupied by different commands and bodies of troops actively engaged in the battle of Gettysburg; that if title be not acquired, it will be impossible to carry out on this part of the battlefield the purposes expressed in the said act of Congress "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets."

7. That the Secretary of War and Attorney General of the United States had directed these proceedings to be instituted.

8. That no agreement could be made with the owners of the tract for its purchase.

9. That the Gettysburg Electric Railroad Company owned or had some interest in or title to said land, and thereupon praying for a jury.

June 19, 1894, the Gettysburg Electric Railway Company filed an answer setting forth—

1. Its incorporation under the act of Assembly of Pennsylvania of May 14th, 1889, providing for the incorporation of street railway companies, and stating the route of the main line of its railway and certain branches thereof, annexing a plan of the same, and that the local authorities had consented thereto.

2. The conveyance to it by certain deeds of the tract of land sought to be condemned "as a part of the route of the first-mentioned branch or extension, and for the purpose of using the same as part of its right of way." "That the said tract of land is a narrow strip over six thousand feet long," being "all that part of the railway of this respondent between the points marked A and B on said plan."

3. That said Electric Railway Company located its railway on said tract of land, upon its acquisition, as early as February 4th, 1892, and had since completed the construction of its railway track throughout the entire length thereof, and that the said tract of land was an integral part of its right of way and franchise; that the part sought to be condemned was and has been since May 1st, 1894, in full and actual operation.

4. That the effect of the condemnation would be to cut the said railway in two, destroy its continuity and prevent its further operation; that said Electric Railway Company did not possess the right of eminent domain, and it could not, therefore, acquire other land.

5. That an appropriation of part of the railway would so impair the value of the whole that the damages would necessarily be the whole or greater part of the value of the property, $200,000.

6. That the balance remaining to the credit of the appropriation of $25,000 under the act of March 3d, 1893, as of June 9th, 1894, was only $9272.56.

7. Denied that it was necessary to condemn the said tract of land to carry out the purposes of the act of March 3d, 1893. On the contrary, it was averred that the proposed condemnation was an arbitrary use of supposed power, exercised only for the avowed purpose of driving the respondent's railway off the battlefield.

On the same day the said Electric Railway Company moved to quash the said petition for the following causes :—

1. That the purposes named for the expenditure of the appropriation in the act of Congress of March 3d, 1893, are not such public uses as authorize the condemnation of private property.

2. Because the purposes specified in the sixth paragraph of the petition are none of them public uses or purposes, authorizing the condemnation by the United States of private property.

3–6. Because it appeared by the answer that the strip of ground sought to be condemned was part of the right of way of a railway in actual use, and that neither the act of August 1st, 1888, nor of March 3d, 1893, nor the joint resolution of June 6th, 1894, intended to authorize the condemnation of land already devoted to a public use.

7. Because no appropriation had been made by Congress for the purchase of said real estate or for the payment of damages.

8. Because the appropriation made in the act of March 3d, 1893, had been to a large extent expended, and that no adequate fund existed for the payment of damages.

9. Because it was provided in the joint resolution of June 6th, 1894: "That no obligation or liability upon the part of the Government shall be incurred under this resolution or any expenditure made except out of appropriations already made and to be made during the present session of this Congress," and said joint resolution was therefore unconstitutional and void.

10–14 were technical causes.

On the same day, the said motion was denied, but "without prejudice to any question thereby raised and with leave to present the same questions for consideration of the court upon coming in of the report of the jury."

On June 23d, 1894, a jury of seven was appointed, which met, and afterwards, upon November 5th, 1894, filed a report, awarding the sum of $30,000 damages.

November 12th, 1894, the Gettysburg Electric Railway Company filed exceptions to the award of the viewers, which were precisely or substantially the same as the reasons given for the motion to quash the petition.

On the same day the Gettysburg Electric Railway Company appealed from the said award.

On November 30th, 1894, the United States appealed from the report of the jury.

On February 20th, 1895, the said Gettysburg Electric Railway Company further answered the petition by stating that the balance remaining unexpended of the appropriation of $25,000, under the act of March 3d, 1893, was as of that date only $2882.17, and that of the appropriation of $50,000 under the sundry civil appropriation act of August 18th, 1894, there had been already expended the sum of $14,000.

On March 20th, 1895, said Electric Railway Company filed a further answer, setting forth that the entire balance remaining unexpended of both appropriations under the acts of March 3d, 1893, and August 18th, 1894, were covered by contracts already made under authority of the Secretary of War, and that there was not in point of fact, at that time, any part of either of said appropriations available for the purpose of paying any judgment which might be recovered by the said company.

March 26th, 1895, the case was argued, and on April 23d, 1895, an order entered that the first and second exceptions filed by the defendant be sustained and that the petition of the United States be dismissed.

II. ARGUMENT.

1.

Whether the purposes named in the act of Congress of March 3d, 1893, are Public Uses, and whether the United States is authorized to Condemn Private Property for said Purposes.

The first and second exceptions to the report of the jury which were sustained in the court below are:—

I. The act of Congress approved August 1st, 1888, provides for the acquisition of real estate by the United States by condemnation only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, Esq., United States Attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the fifth paragraph thereof, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3d, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons.

II. The purposes specified in the sixth paragraph of the said petition, namely, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," are none of them public uses or purposes authorizing the condemnation by the United States of private property.

It is conceded, of course, that the right of the United States to take private property for certain public uses is now firmly fixed, but as is stated in the opinion of the learned Circuit Court judge, it is equally well settled that this right cannot

be exercised, within the limits of the States, for any purpose which is not incident to some power delegated to the General Government, and necessary or at least adapted to its execution.

This rule has been expressed as follows :—

In Hare on the Constitution, vol. I, page 346, "It follows that the right of eminent domain cannot be exercised by the General Government for any end, which is not expressly or impliedly within the scope of the powers of the United States."

In Kohl *vs.* U. S., 91 U. S., 372, "It (the right of eminent domain) is a right, which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution."

In the late case of Cherokee Nation *vs.* Southern Kansas Railway, 135 U. S., 642, Mr. Justice Harlan considered (see page 656) the authority of the United States to exercise the right of eminent domain. He said: "It can only be for a purpose necessary to the execution of the powers granted to the General Government by the Constitution." And on page 657, "The lands * * * are held subject to the authority of the General Government to take them for such objects as are germane to the execution of the powers granted to it." In that case a right of way through the Indian Territory had been granted by Congress to the railway company. The authority to do so was put on the power to regulate commerce by making highways.

See also Mr. Justice Field in U. S. *vs.* Fox, 94 U. S., 315, and

Mr. Justice Gray in Van Brocklin *vs.* Tennessee, 117 U. S., 154.

In the last case, Shoemaker *vs.* U. S., 147 U. S., 282, in which it was held that land taken in a city for public parks and squares, by authority of law, is taken for a public use, which, however, is meant as a general proposition, Mr. Justice Shiras, page 298, said: "A distinction, however, is attempted in behalf of the plaintiffs in error between the constitutional powers of a State and those of the United States, in respect to the exercise of the power of eminent domain, and this distinc-

tion is supposed to be found in a restriction of such power in the United States to purposes of political administration; that it must be limited in its exercise to such objects as fall within the delegated and expressed enumerated powers conferred by the Constitution upon the United States, such as are exemplified by the case of post offices, custom houses, court houses, forts, dock yards, &c. "We are not called upon by the duties of this investigation to consider, whether the alleged restriction on the power of eminent domain in the General Government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess not merely the political authority that belongs to them as respects the States of the Union, but likewise the power 'to exercise exclusive legislation in all cases whatsoever over such district.'"

There is indeed no difference between the learned judges below upon this point in this case, the dissenting judge agreeing that the use for which the Government may take land "must be such as arises out of the exercise of its legitimate functions."

The question, therefore, for consideration is whether the purposes named in the act of 1893, four in number, (1) "for the purpose of preserving the lines of battle at Gettysburg, Pa.; (2) for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field; (3) for the opening and improving avenues along the positions occupied by troops upon those lines and for fencing the same; and (4) for determining the leading tactical positions of batteries, &c., with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," have such a relation to the powers granted by the Constitution as to come within the above-stated rule.

This question is for the court.

Mr. Justice Harlan said in Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., 657: "The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."

Undoubtedly Congress is the sole and exclusive judge whether the necessity, expediency or propriety exists, calling upon it to exercise or delegate the power of eminent domain, but it is just as certain that the action of Congress does not conclude or in any way affect the question, whether the purpose intended is one for which Congress may exercise its authority.

Indeed, no matter how clearly Congress should declare the use for which property is intended to be taken to be in execution of some granted or implied power, it must still appear to the court to be really a use requiring the acquisition of private property in order to execute a power in Congress.

The courts in all the States concur in holding that whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary.

See numerous cases cited in note 1, section 158, Lewis on Eminent Domain.

The difference between Congress and the legislatures of the State should again be referred to in connection with a consideration of the question, what is "public use," for not only must the use be one referable to a power in Congress, bnt it must be a public use.

There is to be considered, therefore, first, the question whether the uses mentioned in the act of Congress are public uses, even in the case of a sovereignty of the character of the States, and secondly, to what power in Congress can the exercise of the power for the said purposes be referred.

It is to be observed at the outset that the question of the publicity of the use is not at all determined and concluded by the fact that the sovereign itself is the medium of the exercise of the power. Such a doctrine would simply put it in the power of the Government to take for any purpose it choose.

A case in West Virginia, Varner *vs.* Martin, 21 W. Va., 534, does indeed consider that where the property condemned is under the direct control of and in use by the Government or some of its public officers, there was no question as to the public use; but so far as such a doctrine is concerned, that case is clearly not law.

It is well settled that the question of public use is not affected by the agency employed; that is, in determining whether the use is public or not, it is an immaterial consideration that the control of the property is vested in private persons. The inquiry must always be, what are the objects to be accomplished—not who are the instruments for attaining them.

Lewis on Eminent Domain, section 160, and cases cited;

Willyard *vs.* Hamilton, 7 Ohio, pt. 2, 111.

There would be no limitation upon the taking of property by the United States if it was conclusively considered that a use was a public one, merely because the property was taken directly into the possession of the Government or its officials.

The law upon this point is well stated in Randolph on Eminent Domain (end of section 51, page 3), where it is said: "As the State may exercise a broad discretion in the choice of agents, the *status* of the agent chosen has little bearing on the question of the publicity of the use itself. Still it may be said that publicity of use is most questionable when the agent is a private corporation; less questionable when it is a political corporation; least questionable when the State itself is the actor."

And see *Ibid.* (section 51, at page 397), where the question, whether the State may undertake any business it pleases, and the right of the State to engage in certain occupations are considered and several cases on the subject are cited.

But at any rate, the doctrine of the West Virginia case is affirmed only of a sovereign of unlimited powers, not of one of the character of the United States, having powers only expressly or impliedly delegated.

There is in the decisions a good deal of uncertainty and conflict as to the meaning of the words "public use," two different classes of views existing, one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that the words are equivalent to public benefit, utility or advantage. Which of these views is correct is considered with a good deal of acumen in Lewis on Eminent Domain, section 165. He concludes (page 224) that *public use* means the same as *use by the public.*

It must be remembered that the question is not, For what purposes may the power of eminent domain be properly exercised, that is by a sovereign State in the absence of restriction. The Constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as, You shall not exercise this power except for public use.

Numerous cases have so held.

In Harvey *vs.* Thomas, 10 Watts, 63, it was said: "The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representative and without just compensation, is a disabling, not an enabling one."

In U. S. *vs.* Jones, 109 U. S., 518, Mr. Justice Field said: "The provision found in the fifth amendment to the Federal Constitution, and in constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power."

The words "public use" cannot therefore be equivalent to the general welfare or public good. As a limitation upon a power, which from its nature is so limited, they must receive a more restrictive definition. Lewis on Eminent Domain, section 163.

The question of public use was much considered in the Twelfth Street Market Company Case, 142 Penna., 580, a case arising out of the condemnation of a market house, which was claimed to be exempt therefrom under a general law because it was property already devoted to a public use. It is there said: "The test whether property of a corporation is held for

a public use so that it cannot be appropriated by another corporation under the right of eminent domain, without express or necessarily implied legislative authority, is the inquiry whether or not a public trust is imposed upon the property; whether the public has a legal right to the use which cannot be gainsaid or withdrawn at the owner's pleasure."

The subject was also discussed in Paliaret's Appeal, 67 Penna., 479, in which it was held that the Pennsylvania act of April 15th, 1869, for the extinction of irredeemable ground rents, could not be sustained as an exercise of the power of eminent domain.

It was argued for the appellant, that in order to justify the taking of property under the right of eminent domain, it must be taken and held by the State or its grantee for specified public uses, which the public has a legal right to enforce, and that only when the public use expressed in the grant attaches to the whole of the property taken under it, so as to give the public immediate, cumpulsory and paramount rights over it in the hands of the grantee, can the right of eminent domain support the grant. *Ibid.*, page 484.

Justice Sharswood, in his opinion, considered the subject at length, and he forcibly repudiated the doctrine that the act could be sustained as a taking for public use, merely because, as the preamble of the act declared, "the policy of the Commonwealth had been to encourage free transmission of real estate and to remove restrictions on alienation, so that it is, and it is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents." See particularly pages 488 and 489.

The Pennsylvania acts providing for the construction of lateral railroads and conferring the power of eminent domain upon private persons in such cases, were sustained upon the ground of the provisions in the law that the public might use such lateral railroads when made upon conforming to certain regulations and paying tolls.

See Thompson, C. J., in Keeling *vs.* Griffin, 56 Pa., 307.

In the famous case of the West River Bridge Co. *vs.* Dix, 6 Howard, 507, holding that a bridge, held by an incorporated

company, under a charter from the State, may be condemned and taken as part of a public road, under the laws of that State, Mr. Justice Woodbury said, page 546: "Nor does even the path for the road, the easement itself, come within the public exigency, which justifies the application of the principle of eminent domain, if the use of it be not public, but merely for particular individuals, and merely in some degree beneficial to the public. On the contrary, the user must be for the people at large—for travelers—for all; must also be compulsory by them, and not optional with the owners; must be a right by the people, not a favor; must be under public regulations as to tolls, or owned, or subject to be owned, by the State, in order to make the corporation and object public, for a purpose like this. 4 Kent. Com., 270; Railroad Co. *vs.* Chappell, 1 Rice (S. C.), 383; Memphis *vs.* Overton, 3 Yerg. (Tenn.), 53; King *vs.* Russell, 6 Barn. & C., 566; King *vs.* Ward, 4 Ad. & E., 384."

See also Cooley's Constitutional Limitations, 6 Ed., 692 and 651. The question is particularly considered on pages 654 and 655, where it is said: "It would not be entirely safe, however, to apply with such liberality the language above quoted, that 'where the public interest can be in any way promoted by the taking of private property,' the taking can be considered for a public use. It is certain that there are very many cases in which property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new, because all these tend to give an aspect of beauty and comfort to the country, and thereby to invite settlement, increase the value of lands and gratify the public tastes; but the common law has never sanctioned the appropriation of property based upon these considerations alone, and some further element must there-

fore be involved before the appropriation can be regarded as sanctioned by our Constitutions. The reason of the cause and the settled practice of our Government must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the Government is supplying its own needs, or furnishing facilities for its citizens in regard to these matters of public necessity, convenience or welfare, which, on account of their peculiar character and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike, proper, useful and needful for the Government to provide."

Lewis' Eminent Domain, page 225, says: "On the other hand, if the Constitution means that private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislature? This view places the whole matter ultimately in the hands of the judiciary as though the Constitution read that private property may be taken for such purposes as the Supreme Court *deem of public benefit or advantage.* * * * It cannot be presumed that the people ever intended to commit such a question to the courts. Whether the public will have the use of property taken under a particular statute is a question which may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion merely, about which men may differ, and which cannot be referred to any definite criterion."

In 18 Wend., 60, Bloodgood *vs.* M. & H. R. R. Co., it was said: "The moment the mode of use is disregarded and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principles to guide us." And see further, same case, page 65.

In Memphis Freight Co. *vs.* Memphis, 4 Coldw., 419 (Tenn.), it was held, that a public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. Public purposes for which land can be taken must be the use for the people at large, and must be compulsory by the public

and not optional with the corporators; it must be a right in the people and not a favor; but where it is a public convenience, not a necessity, the right to take private property does not exist. If the legislature should take private property for a purpose not of a public nature under pretext of some public use or service, this would be a gross abuse of their discretion and a fraudulent attack on private right, and the law would be unconstitutional and void.

In Sholl *vs.* German Coal Co., 118 Ill., 427, the court said, page 432: "Without attempting to define the public use or to give such a test, a few general observations on the subject may not be inappropriate. The expression, public use, *ex vi termini*, implies an interest or right of some kind in the public. And as the public can have no existence separate and apart from the people of which it consists, it follows that this interest or right itself belongs to and is vested in the people. * * * Persons or corporations condemning property for such purposes (of a public ferry, railway or the like) assume certain obligations and duties to the public which they cannot disregard without forfeiting their franchises and otherwise rendering themselves liable. In all such cases the character of the business proposed to be done and the manner of doing it must be looked to in determining whether the use will be a public or private one. If from the nature of the business and the way in which it is to be conducted, it is clear that no obligations will be assumed to the public or liability incurred other than such as pertain to all strictly private enterprises, it may safely be concluded that the use is private and not public."

In line with these principles are the cemetery cases.

The condemnation of ground for a cemetery has only been sustained, where the right of burial is vested in the public or in the public authorities.

Lewis' Em. Dom., section 176, and cases, note 1;

Mills' Em. Dom., section 19, and cases in notes.

And Lewis says, section 353: "A petition for a cemetery should show that the privilege of interment is open to the public, as a cemetery may be private as well as public," citing

53 Conn., 551, Evergreen Cemetery Assn. *vs.* Beecher.

It is to be observed in this connection that the remark of the learned dissenting judge below, "The land described in the petition is adjacent to the Gettysburg National Cemetery. I cannot doubt it might have been taken to enlarge and improve that property. * * * This, however, is not the purpose named in the statute," is founded in error. An inspection of the plan shows that the ground proposed to be taken is nowhere near the cemetery. It is, in point of fact, about two miles therefrom.

And see other cases in which the courts have refused to sustain a taking of private property *in invitum*, upon the ground that the object of the use was merely pleasure or ornament.

In the latest book on the law of Eminent Domain, that of C. F. Randolph, section 52, it is said: "It appears that a use, the object of which is merely pleasure or ornament, is not a necessary use;" the following cases being referred to:—

2 Johnson's Ch., 162, Gardner *vs.* Village of Newburgh, where Chancellor Kent said, page 166, as follows:—

"Grotius (De Jur., B. & P., book 8, chapter XIV., section 7), Puffendorf (De Jur. Nat. et Gent., book 8, chapter V., section 7) and Bynkershoeck (Quaest. Jur. Pub., book 2, chapter XV.), when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses when public necessity or utility require it, but they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. The last of those jurists insists that private property cannot be taken on any terms without the consent of the owner for purposes of public ornament or pleasure; and he mentions an instance in which the Roman senate refused to allow the prætors to carry an aqueduct through the farm of an individual against his consent, when intended merely for ornament.

In re Niagara Falls and Whirlpool Ry., 108 N. Y., 375, where a railroad company was organized to build a railroad from the foot of Niagara Falls along the margin of the river and near the water's edge to the whirlpool, it appeared that the river on the easterly side is faced with high cliffs, that there

could be no habitations along the route and no traffic or business except in conveying visitors to the Falls over the road to see the river and the whirlpool, that the season and business of the road would be confined to Summer months and the road could not be operated during the Winter. *Held*, proposed road was not a highway in any proper or just sense of the term, and that therefore the use was not a public use to justify the taking of land *in invitum*.

The court said, page 385: "What is a public use is incapable of exact definition. The expressions public interest and public use are not synonymous; the establishment of furnaces and mills and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote in a general sense the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. * * * The fact that the road of the petitioners may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the legislature to condemn lands for an inclined railway or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls. The State has, under recent legislation, taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks is recognized as a taking for public use. (Brooklyn Park Commissioners *vs.* Armstrong, 45 N. Y., 234; *In re* Mayor, &c., 99 *Id.*, 569.) They contribute to the health and enjoyment of the people and are laid out with drives and ways for public use. The proceedings in the case of the Nahant Road (11 Allen, 530) and the Mount Washington Road (35 N. H., 134) were justified on the ground that they were public highways in the ordinary sense, although

primarily intended as pleasure drives. It is, as we have stated, difficult to make an exact definition of a public use. It is easier to define it by negation than by affirmation."

28 Vert., 587, Town of Woodstock *vs.* Gallup: "Ornament and improvement of grounds about a public building do not alone constitute a sufficient ground for establishing a highway."

60 Conn., 278, Farist Steel Co. *vs.* Bridgeport: "Where a harbor line was established solely in order that an expensive and sightly bridge might not be hidden from view by a building placed upon each side of it, it was held not to be a public use for which lands could be taken."

The cases of Higginson *vs.* Nahant, 11 Allen, 530, and Mt. Washington Road, 35 N. H., 134, are distinguishable from the present case. There are no public highways in the ordinary sense in the case before the court. See Niagara Falls & Whirpool Ry. case, *supra.*

But the great question in this case, and this must be considered, supposing even that it be determined that the purposes named in the act of 1893 are public uses, in the proper sense of those words, is, Has the United States Government the power to condemn private property for such purposes?

It is to be remarked, in this connection, that a great difference exists between the two classes of decisions, that is, in national and State cases.

In the first the courts, in recognizing the existence of the United States Government's right of eminent domain, have always coupled that recognition with an enumeration of the subjects wherein it may be legitimately used, while on the contrary, if the power were exercisable by a State, it has simply said the use must be public, and applied that rule.

The difference between the two classes of cases is thus expressed in Cooley's Constitutional Limitations, sixth edition, page 645:—

"As under the peculiar American system the protection and regulation of private rights, privileges and immunities in general belong to the State government, and those governments are expected to make provision for the conveniences

and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation; and such has been the conclusion of the authorities. In the new Territories, however, where the Government of United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the Territorial government; but this right passes from the nation to the newly-formed State whenever the latter is admitted into the Union. So far, however, as the General Government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions—as must sometimes be necessary in the case of forts, lighthouses, military posts or roads and other conveniences and necessities of the Government—the General Government may still exercise the authority, as well within the States and within the Territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority.

And note, for instance, Mr. Justice Strong said in Kohl *vs.* U. S., 91 U. S., 371: "The powers vested by the Constitution in the General Government demand for their exercise the acquisition of land in all the States. These are needed for forts, armories and arsenals, for navy yards and light houses, for custom houses, post offices and court houses, and for other public uses."

Mr. Justice Field said, in U. S. *vs.* Fox, 94 U. S., page 320: "It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the Government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, light houses, custom houses, court houses, barracks, hospitals or any other of the many public purposes for which such property is used."

It was there held that a devise of lands in New York to the Government of the United States, for the purpose of assisting to discharge the debt created by the war of the rebellion, was void, a statute of New York providing that a devise of lands in that State can only be made to natural persons or to New York corporations authorized to take by devise.

It was argued, page 317, that if land can be taken by the United States for public uses by process *in invitum*, it would certainly seem that the United States might also accept land when voluntarily donated or devised, and that its power to take and hold land, in order to secure, liquidate or compromise debts due to it, has been recognized by legislation and judicial decision ever since the early days of the Republic.

In 117 U. S., 151, Van Brocklin *vs.* Tennessee, a case arising out of taxation by a State of lands held by the United States, Mr. Justice Gray, speaking of the right of eminent domain in the United States, said, page 154, that it could be exercised "whenever such property is needed for the use of the Government in the execution of any of its powers, whether for arsenals, fortifications, light houses, custom houses, court houses, barracks or hospitals, or for any other of the many public purposes for which such property is used."

And in the North River Bridge case, 153 U. S., 525, the same learned justice said, page 529: "And whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the State in which the lands lie. Van Brocklin *vs.* Tennessee, 117 U. S., 151, 154, and cases cited.

And all the adjudicated cases show that the character of the use for which the right of the United States to take private property has been sustained is that indicated in the foregoing citations.

106 Mass., 356, Burt *vs.* Ins. Co., for a post office;
91 U. S., 367, Kohl *vs.* U. S., for U. S. courts;
109 U. S., 513, U. S. *vs.* Jones, to improve water communication between Mississippi River and Lake Michigan;

112 U. S., 645, U. S. *vs.* Great Falls Man. Co., for supplying cities of Washington and Georgetown with water;

1 Brew., 524, *Re* League Isd., for a navy yard;

18 Cal., 229, Gilmer *vs.* Line Pt., for a fort;

14 Md., 444, Reddell *vs.* Ryan, for water works for the National Capital;

54 N. H., 590, Orr *vs.* Quimby, for coast survey purposes;

7 Howard, 185, U. S. *vs.* Chicago, for military purposes.

It is to be further observed that the seventeenth clause of article I., section 8, of the Constitution, U. S. Rev. Stat., page 21, that Congress shall have power to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the legislature of the State in which the same shall be, had already indicated the character of the purposes for which it was intended the United States should acquire land in the States, for it particularly enumerates the purposes "for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

See the case of Fort Leavenworth R. Rd. Co. *vs.* Lowe, 114 U. S., 525, as to different methods of acquisition of land in the States by the United States, and the effect of using and not using the same as instrumentalities of the powers of the General Government.

See also in the same connection the acts of Congress in force authorizing or regulating the taking of private property for public use.

Note 1, page 601, supplement to United States Revised Statutes.

The purposes specified are national cemeteries, sites for life-saving stations, light houses, for improvement of rivers and harbors, for fortifications and coast defenses, and Government Printing Office.

The present case is none of these.

Under which, then, of the powers granted to Congress is

it contended the purposes named in the act of 1893 are in execution of? To what authority in Congress is it germane?

Under which of the enumerated purposes instanced in the authorities does this case come?

Under what "other of the many public purposes for which such property is used" does the condemnation of the Electric Railway's right of way come?

There is no suggestion as to this.

But the purpose and the power must both be stated; it will not do to generalize and thus avoid accurate expression.

In the consideration of this question the provision of the act of March 3d, 1893, "for opening and improving avenues along the positions occupied by the troops," may be put aside, for clearly it does not, as a separate object, fall within any power which Congress has.

Aside from the question of whether such avenues would be highways in a legal sense, that is, supposing they were such, though as to this see the Niagara Falls and Whirlpool Railway case, 108 N. Y., 375, stated *supra*, Congress has no power to provide for the opening of highways *entirely within the limits of a State*, and it cannot therefore authorize the taking of ground for such a purpose.

Congress has power to provide only for those highways, whether roads, bridges or railroads, which are intended as a means of communication between the States.

127 U. S., 1, California *vs.* Central Pac. R. Rd. (see particularly page 39);

135 U. S., 641, Cherokee Nation *vs.* Kansas Pacific R. Rd.;

153 U. S., 525, North River Bridge Company case.

In all these cases the power of Congress to provide such highways was put upon the power to regulate commerce.

See also 148 U. S., 312, Monongahela Nav. Co. *vs.* U. S., and particularly page 342.

The provisions of article I., section 26, of the Constitution of the United States is: "Congress shall have power * * *

to regulate commerce with foreign nations and among the several States."

This necessarily excludes from Federal control all that commerce which is entirely carried on within the limits of a State, and does not extend to or affect other States.

The Daniel Ball, 10 Wallace, 557;
Gibbons *vs.* Ogden, 9 Wheaton, 1;
See Hare on the Constitution, pages 246–8, as to highways and internal improvements.

When this case was argued in the court below the objects of the act of 1893 were referred by the learned United States Attorney to article I., section 8, of the Constitution empowering Congress "to levy and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States."

The learned circuit judge so remarks, page 29, Transcript of Record.

That, however, has been cast aside by the learned dissenting judge below, who, so far as he refers to an express power, puts it upon that clause of article I., section 8, which authorizes Congress "to raise and support armies," see page 30, Transcript of Record.

It is necessary to consider both of these provisions, for either or both may be urged in this court.

Judge Hare, whom the Supreme Court of Pennsylvania designated in Forepaugh *vs.* D. L. & W. R. Rd. Co., 128 Pa., 217, as "the most learned of living jurists," in his work on the Constitution considers the first of these clauses and the two interpretations which have been made thereof. He says, vol. I, pages 241–2:—

"This clause has been regarded in different aspects, and as variously interpreted. Agreeably to one view, it is not a single grant, but confers two very different powers, which are incongruously grouped under the same head—a power to raise money by taxation and a power to provide for the common defense and general welfare. Agreeably to the other, it is simply an authority to lay taxes, subject to two qualifica-

tions—that taxation shall be uniform, and that it shall not be imposed for objects which are merely local and do not concern the entire people. The former view is now generally conceded to be repugnant both to the interpretation which would naturally be put on the clause if it stood alone and to the tenor of the instrument as a whole. It wrests the latter part of the paragraph from its antecedent, and gives it an entirely different meaning from that which it would have if considered relatively as part of the same sentence. Unpunctuated, the clause is simply a power to raise money by taxation, without a designation of the purposes for which it may be expended; read with a semicolon after "excises" it becomes a substantive ground so broad and sweeping as to confer not only all that is subsequently enumerated, but much which the specific grants impliedly exclude.

"A government authorized to provide for the common defense and general welfare is virtually absolute, because it must determine what means are requisite for the end in view, and its decision will necessarily be binding on the courts. If such were really the meaning of the clause under consideration, the Tenth Amendment, that 'powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people,' would have no real significance, since when all has been in effect given there can be nothing to withhold; and the concluding words would supersede the first or render them superfluous, because the duty to provide for the common defense and general welfare would imply the right to tax as indispensable to its fulfillment. The clause should therefore, as Story observes, be read as if it contained two words, which are in effect implied, and will then stand as follows: 'Congress shall have power to lay and collect taxes, duties, imposts and excises, *in order* to pay the debts and provide for the common defense and general welfare of the United States,' the common defense and general welfare and the payment of the public debts being the ends for which the power is conferred, and taxation the means for their attainment."

The authority conferred by this provision is not, therefore,

to do anything and everything which Congress may decide to be for the common defense and general welfare of the United States. It is a statement of the objects for which Congress may lay and collect taxes.

And it has been said that Congress is not empowered to tax for those purposes, which are within the exclusive province of the States.

Gibbons *vs.* Ogden, 9 Wheaton, 199.

The Gettysburg battlefield has already been the subject of legislation by the State of Pennsylvania.

See the act of April 30th, 1864, P. L., 670, incorporating the Gettysburg Battlefield Memorial Association, for the purpose of holding and preserving the battle grounds of Gettysburg as they were at the time of the battle, with power to take and hold by gift, devise, purchase or otherwise, all such portions of said battle grounds as may be necessary or convenient to accomplish the object of its incorporation. And the supplement to the said act, approved April 24th, 1866, P. L., 1075, conferring power on the president and directors to survey and lay out roads and avenues in the vicinity of Gettysburg or of the said battle grounds, &c., and providing that in case said association could not agree with the owner or owners of such lands, for the taking of proceedings to condemn the same.

Under the authority of this act the Memorial Association has laid out various roads and avenues and has acquired ground for that purpose, both by purchase and condemnation.

It is quite sufficient, however, to say in the words of the opinion below, that the power to lay and collect taxes is quite distinct from the right to take private property for public use, and that it is not the power of taxation but the right of eminent domain which is here asserted.

There is a good deal of difference between the power to tax and the power of eminent domain.

1 Hare on the Constitution, page 333.

The power of the Legislature of Pennsylvania to tax is practically without limit or control. It may be applied to all

objects promotive of the general good, though remote and indirect.

21 Pa., 147, Sharpless *vs.* Mayor of Phila.;

52 Pa., 474, Weister *vs.* Hade.

It is peculiarly a legislative function.

85 Pa., 179, Kelly *vs.* Pittsburgh.

The power to tax is the strongest, the most pervading, of all the powers of government.

20 Wall, 655, Loan Association *vs.* Topeka.

The power of Congress to tax and spend money under the above-mentioned provision of the Constitution is practically unlimited.

The learned author, Judge Hare, considers (The Constitution, pages 242 to 245) whether the taxation clause is an authority to raise money and consequently to appropriate it for any purposes which Congress might deem conducive to the common defense or general welfare, or whether it merely authorizes the laying and collection of taxes for the execution of the enumerated powers, and after stating the doctrines of Hamilton and Madison on this subject, and the practice of the Government itself, concludes, page 245, as follows: "So Monroe acknowledged that in the early stages of the Government he had inclined to the opinion that it had no right to expend money except for the performance of acts authorized by the other specific grants of power according to the strict construction of them, but that on further reflection and observation his mind had undergone a change, and that his opinion then was "that Congress have unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate to purposes of common defense and of general national, not local or State, benefit." This recantation was, like that made previously by Madison, a virtual adoption of the Hamiltonian theory, that the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defense of the country or promote its welfare. Such, in fact, had been the practice since

the Government went into operation, and the right can hardly be disputed in the face of a usage which will soon extend through an entire century."

"In the greater number of the instances referred to the Government did not act in its sovereign capacity, but like a rich and public-spirited individual who draws his purse strings for the common good."

No one holds that this is true as to the right of eminent domain.

The power of eminent domain is expressly provided for by article V. of the amendments to the Constitution, "Nor shall private property be taken for public use without just compensation."

This is a limitation upon the exercise of this power by the Government of the United States.

7 Pet., 243, Barron *vs.* Baltimore.

The power "to raise and support armies" has not been the subject of much judicial interpretation. The cases have referred exclusively to the powers of Congress with reference to enlistments in the army and navy.

It may be urged, referring to the clause in the act of 1893, "with reference to the study and correct understanding of the battle," that the taking of private property may be defended under this clause, because the design is to furnish an open-air school for the education of future soldiers and sailors. This is, indeed, a far-fetched application.

The act of 1893 does not provide for a military school, nor for a school for students of American history, nor do the objects of the act contemplate any of the said purposes.

This matter is to be looked at solely with reference to what the United States proposes to do by the terms of the act under which these proceedings are conducted.

The United States has not yet acquired any ground for a national park. The ground is already acquired, to a large extent, by the Gettysburg Battlefield Memorial Association, a corporation of the State of Pennsylvania, but its purposes and acts cannot be used to help out the action of the United States in the proposed condemnation.

It does not propose to establish highways; that is, in the legal understanding of such a term—a road or street maintained by the public for interstate communication which every citizen has a right to use for purposes of travel.

It is idle to talk of a *military* school, and a school for students of American history is not an object upon the basis of which the United States has yet attempted to take private property.

Besides, such an object is not accomplished or furthered by the appropriation of a strip of land thirty feet wide and six thousand feet in length. The mere statement of these purposes, which are afterthoughts, shows that they are all pretensions.

We know of no instances in which the United States has given any pretense for such construction by the establishment of schools, except in the cases of West Point, Annapolis and Carlisle, which are all essentially so different in character that they are inapplicable to this case.

And it is to be said generally that the power of the United States Government to condemn private property for the purposes named in the act of 1893 is not determined by the fact that the Government has acquired land for the purpose of establishing schools at West Point, Annapolis and Carlisle (the latter was originally a cavalry barracks), supposing the cases were of the same character.

Judge Hare says, page 243: "The right of providing for popular education confessedly belongs to them (the several States) and not to the United States, and yet the latter may, if the Hamiltonian argument is sound, lay taxes with the view of endowing public schools which it can neither establish nor regulate."

And on page 246: "It is one thing to construct a highway by virtue of the power of eminent domain and exercise an absolute jurisdiction over it when made, and another to lay out a road through land acquired by purchase with the consent of the State through which it passes. So Congress may well be entitled to appropriate money for public education or even to build and endow colleges and schools and yet want

the right to make attendance compulsory and enforce it by fines or penalties."

And on page 248: "In other words, although the United States may go into the market and do whatever can be done by the use of money without the exercise of legislative, executive or judicial power, they cannot, speaking generally and where there are no special grounds, do more."

The Government may purchase land and devote it to a great many purposes which it could not be contended would entitle it to condemn the same against the will of the owner. Perhaps the United States Government has no technical right to acquire real estate except for a proper governmental purpose, but we know of no way in which, in case it does so, the question of its right to hold the same can be raised, or if found nonexisting to deprive it thereof. When, however, the Government seeks to take private property it can and will be prevented from accomplishing that purpose if the object be not one which it has power to carry out.

It need scarcely be said that the remark of the dissenting judge below, that counsel for the appellee here admitted that the Government should own the land, but should obtain it by purchase, and that a concession that it may purchase or accept the land as a donation for the uses stated, seems to be a plain concession of the right to take (page 31, Transcript of Record), is conclusive. The admissions of counsel can scarcely be a basis of a power in Congress, but in fact the two things are quite different, and the power to take is not arrived at simply by accepting the position that the Government might buy if it could.

It is to be borne in mind that no question as to the recent act of Congress, approved February 11th, 1895, entitled "An act to establish a national military park at Gettysburg, Pennsylvania," arises in this case.

This proceeding is exclusively under the preceding legislation, the act of 1893.

The United States has, indeed, since the passage of the Park act brought another proceeding thereunder, in which, however, nothing further has yet been done. Although the

United States Attorney was invited by us, before the argument below, to take steps to bring the present proceedings under the Park act, he declined to do so.

It is by no means clear, however, that the United States may condemn land in a State for the purpose of a national park.

This question was argued and received some consideration in Shoemaker *vs.* U. S., 147 U. S., 282, but the decision was expressly rested upon the ground that the place of the exercise of the power was the District of Columbia, over which Congress has exclusive power of legislation.

An examination of the Park act will moreover show that it chiefly contemplates the acquisition of the lands belonging to the Gettysburg Battlefield Memorial Association (sections 1–3), and that there is no intention expressed to acquire such property as the whole or parts of the electric railway.

Section 4 provides for the acquisition of such "lands," &c., and such "adjacent lands," &c. There are no other words used in the act indicating the subject of acquisition by the United States.

Inquiry at the War Department has failed to discover that the map referred to in section 4 has in fact been filed there.

What conclusively shows, however, that the Park act has no bearing upon or relation to the pending proceedings against the Electric Railway Company is that it was passed at the second and not at the first session of the last Congress; the resolution of June, 1894, limiting the liability of the Government to the appropriations made at the latter.

Finally, it is at the least interesting to note in connection with this subject that so distinguished a lawyer as Senator Gray took occasion to express himself, when the joint resolution of June 6th, 1894, was before the Senate, as having very serious doubts as to the right of the Government to take private property by condemnation for the purposes named in the act of 1893.

He said, *Congressional Record*, 1894, page 6663: "The Senator (Allen) did not understand the point of my objection.

Undoubtedly the Government has the right to purchase, but this is perfecting a power to take the land by the right of eminent domain. As the Senator knows, for many years in our history the right of eminent domain was denied by publicists and jurists in this country to the Federal Government at all; and when finally conceded, as it seems to have been of late years, it was confined to land that was taken as necessary for a public object. Whether this is one of those public objects which the courts have decided may justify the power of eminent domain I have very serious doubts. It has never been passed upon except in the case of the taking of land for a post office or other public building, which is conceded to be a public object."

No case is produced, nor can any be found, in which condemnation proceedings have been sustained in a case like this, *against the owner's consent or without his acquiescence.* If land has been condemned in any case to commemorate a battlefield, it has been without objection on the part of the property owner.

2.

Inadequacy of the Appropriation and the Proviso of the Resolution of June 6th, 1894.

The judgment below was rendered wholly upon a consideration of the first and second exceptions to the report of the jury, because, upon the view taken by the circuit judge, nothing more was then required; but there were several other questions of great importance which it is also necessary to consider here, for it would not at all follow, should this court be of a different opinion upon the preceding question, that the judgment should be reversed.

The dissenting judge below recognized this, for he said at the conclusion of his opinion (Transcript of Record, page 32), "I believe the other objections urged against the proceeding, as well as the exceptions to the report of the jury, should also be dismissed."

The judgment should, therefore, be affirmed, if for any reason, urged under the motion to quash the petition or upon

exceptions to the report of the jury, the proceeding is not sustainable.

The next subject for consideration is, indeed, immediately connected with that first considered; the seventh, eighth and ninth reasons upon the motion to quash (Transcript of Record, pages 13 to 14), and the seventh exception to the report of the jury, *Ibid*, referring thereto.

They are as follows:—

VII. (Reason.) It does not appear by the said petition that any appropriation has ever been made by Congress for the purchase of the real estate mentioned in the fifth paragraph of the petition, or of any real estate to be acquired for the purposes referred to in the Act of March 3d, 1893, or for the payment of damages therefor in case of the condemnation thereof. The said act does not provide any means by which the respondent can obtain payment of the damages to be awarded to it for the appropriation of the said tract of land. If the said petition be allowed and a jury be appointed and the property of the said Electric Railway Company be condemned and appropriated, the said company will be without any remedy whereby payment of the damages awarded can be obtained or enforced.

VIII. (Reason.) Because it appears by the said answer of the Gettysburg Electric Railway Company that the appropriation of $25,000 mentioned in the said act of March 3d, 1893, has been, to a large extent, already expended for the purposes specified in the said act, the sum of $9272.56 only remaining unexpended, and that, in point of fact, no adequate fund exists for the payment of the damages to be awarded the respondent for the appropriation of the said strip of ground.

IX. (Reason.) Because it is provided in the joint resolution of Congress, approved June 6th, 1894, set out in the fourth paragraph of the said petition, "that no obligation or liability upon the part of the Government shall be incurred under this resolution or any expenditure made except out of appropriations already made and to be made during the present session

of this Congress." The said joint resolution thus places a limit upon the amount of damages for which only an obligation or liability on the part of the Government is recognized, and prohibits this respondent from obtaining payment from the United States of any sum which may be awarded to it in excess of the balance remaining of the appropriation made by the act of March 3d, 1893, to wit, the sum of $9272.56, and of some amount which may be, but which has not been, appropriated during the present session of this Congress. The said joint resolution is therefore unconstitutional and void.

VII. (Exception.) It does not appear by the said petition that any appropriation has ever been made by Congress for the purchase of the real estate mentioned in the fifth paragraph of the petition, or of any real estate to be acquired for the purposes referred to in the act of March 3d, 1893, or for the payment of damages therefor upon the condemnation thereof. The said act does not provide any means by which the respondent can obtain payment of the damages awarded to it for the appropriation of the said tract of land. The said company is without any remedy whereby payment of the damages awarded can be obtained or enforced.

The first act of March 3d, 1893, appropriated the sum of $25,000. The act of August 18th, 1894, appropriated the sum of $50,000, and this is the total of the appropriations made during the session of Congress at which the resolution of June 6th, 1894, was passed. See proviso thereto.

By the supplemental answers it appears that the balance to the credit of the first-named appropriation was, February, 1895, $2882.17, and the balance to the credit of the other was, as of the same date, $36,000.

It further appears, however, by the answers filed March 20th, 1895, that the entire balance remaining unexpended of both of the above-mentioned appropriations is covered by contracts already made under the authority of the Secretary of War, for purposes for which the said appropriations were made, and that the execution of the said contracts will require the expenditure of the entire balances remaining of

both the said appropriations, so that there was not, in point of fact, nearly a year ago, and there is not now, any part of either of the said appropriations available for the purpose of paying and discharging any judgment which may be recovered by the respondent in this proceeding.

Of course there is a distinction between a taking by a State or the United States and a taking by corporations under a delegation of power.

In the former case the giving of security is not necessary, but something in the way of a provision for compensation is.

The cases in which the resources of taxation to be employed in raising the amount have been held to afford a sufficient security, were those in which the law contained some provision stating how payment was to be made. It was because *sure* and *certain* provision was made for *obtaining* compensation, that it was held that the provision in the Constitution was satisfied.

See Lewis' Em. Dom., section 457, and cases in note 2, and particularly Talbot *vs.* Hudson, 16 Gray, 417, 431, an extract from which is given. This case is referred to at length, *infra.*

It was held in Keene *vs.* Bristol, 26 Pa., 46, that if it appears that the resources of a municipal corporation, from taxation or otherwise, were insufficient to enable it to make compensation in a reasonable time, an entry will be enjoined until security be given.

In 68 Pa., 170, Long *vs.* Fuller, the act in express terms provided that "the funds of the district, which may be raised by taxation, shall be pledged and deemed as security."

These were cases where there was a general power of taxation. Congress has no general power of taxation.

The power given in article I., section 8, of the Constitution, Bright. Purd., 5, is limited and specific.

Gibbons *vs.* Ogden, 9 Wheat., 199.

The taking of land from a citizen for the use of the United States cannot be constitutional without a provision being made for a tribunal for the ascertainment of compensation, and for a method by which payment can be *enforced* by such

proper tribunal, or a *pledge of public faith being made that a distinct fund should be held by the Government for its payment.*

The settled and fundamental doctrine is thus stated by Chancellor Kent, 2 Comm., 12th Ed., 339, note "f": "The settled and fundamental doctrine is that Government has no right to take private property for public purposes without giving a just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain."

The doctrine is as fully stated as anywhere, in the case of Bloodgood *vs.* Mohawk & Hudson River R. R. Co., 18 Wendell, 9, where it was said: "I do not mean to be understood that the legislature may not authorize a mere entry upon the land of another for the purpose of examination or of making preliminary surveys, &c., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property, if it should afterward be taken for the public use. But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so."

The same doctrine will be found in a great number of cases.

In 6 Hill, 361, People *vs.* Hayden, it was said: "Although it may not be necessary within the constitutional provision that the amount of compensation should be actually ascertained and paid before property was thus taken, it is, I apprehend, the settled doctrine, *even as respects the State itself*, that at least certain and ample provision must be first made by law

(except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay, otherwise the law making the appropriation is no better than blank paper."

In 38 N. J. Law Rep., 151, Loweree *vs.* City of Newark, it was said: "It is not necessary that compensation should be preceded by an actual appropriation of land for public use by the State or by a municipal corporation by State authority. It is sufficient that an adequate remedy is provided, which the party may resort to on his own motion to recover compensation. In this respect there is a distinction between the taking by a public municipal corporation and by an individual or private corporation."

In 127 Mass., 50, Conn. River R. R. Co. *vs.* Commissioners, it was held that a statute authorizing the manager of a railroad, owned by the Commonwealth, to take land for a passenger station, and providing no other mode of compensation to the owner of the land than that such shall be paid for from the earnings of the railroad, is unconstitutional, even if such earnings will probably be sufficient to meet all claims for land damages. The owner of land taken by the manager of a railroad owned by the Commonwealth under a statute, that does not make adequate provision for the payment of compensation for the land so taken, may have the writ of prohibition to prevent the commissioners from proceeding with the assessment of damages.

The court said, page 54, speaking of statutes authorizing the taking of private property for public purposes, and providing for the ascertainment of the damages and for the payment thereof out of the treasury of the county, town or city: "But in the cases in which it has been so held (that the statutes were constitutional), the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, which might be enforced by writ of execution or warrant of distress or by *mandamus* to compel the levy of a general tax. * * * In the statute before us there is no pledge of the faith and credit of the Commonwealth, no appropriation of the general fund in its treasury and no authority

to the Governor to draw his warrant for the payment of his damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation or authority. * * * The fact admitted by the parties that those earnings (of the railroad) will probably be sufficient to meet and extinguish all claims for damages for land so taken, fall short of satisfying the requirements of the Constitution, that the owner of property, taken for the use of the public, shall have a prompt and certain compensation without being subject to any risk or unreasonable delay.

And see further—

Gallison *vs.* Hedrick, 5 Gatt., 244;
People *vs.* Green, 3 Michigan, 496;
Jackson *vs.* Winn's Heirs, 4 Lit., 323;
Ash *vs.* Cummings, 15 N. H., 591;
White *vs.* Nashville R. R., 7 Heisk., 518;
Simms *vs.* R. R. Co., 12 Heisk., 621;
Brock *vs.* Heisson, 4 Wis., 674;
State *vs.* Messenger, 27 Minn., 119.

In Commth. *vs.* R. Rd., 58 Pa., 50, the court said: "It has been held more than once by this court and may be regarded as firmly established, that though it is not necessary that the compensation should be actually ascertained and paid before the property is appropriated, it is requisite that an adequate remedy should be provided by which the individual can *obtain* compensation *without any unreasonable delay.*"

The difference in the exercise of the power of the State between private and public hands is stated by Lewis, J., in Yost's Report, 17 Pa., 524, who refers to the principle of the amendment of 1838 (Pennsylvania Constitution), and says, quoting the language of Gibson, C. J., in Nav. Co. *vs.* Coons, 6 W. & S., 114: "The difference between the two classes of cases has been held to be that a corporation or individual *must pay* or *secure* the price of the property *before* it is taken; but the State must provide the *means* of payment *at the passing of the act.*"

And the same court said, *In re* Sedgeley Avenue, 88 Pa., 576: "It is a part of our fundamental law, that compensation

shall be paid or secured before the property of the citizen shall be taken for public use. In view of the unsatisfactory financial condition of some of the municipal corporations of the State, this court has gone far enough, in my judgment, in holding that actual payment or security is not necessary on the part of such corporations to enable them to take private property for public use; that the taxing power in the hands of such bodies is a sufficient security, and that if the legislature provided a remedy by which the person whose property is taken may *enforce* his rights, it is sufficient."

In Orr *vs.* Quimby, 54 N. H., 590, which was a case involving the right of the Government to take land for the purpose of the United States Coast Survey, it was said: "The plaintiff's property has been taken by the public under color of a compulsory purchase, and, for payment, he is recommended to the public mercy. Suppose he has a trifling claim, in contract or tort, against the most wealthy and honest man, which it is morally certain will be paid as soon as the debtor is informed of its existence; the plaintiff, unnecessarily, unreasonably and vexatiously brings a suit; the defendant pleads a moral certainty of compensation, and the plaintiff demurs; the court must sustain such demurrer. The moral certainty of mercy is not changed into a legal vindication of a constitutional right, by the circumstance that the number of persons from whom mercy is expected is forty millions."

In Haverhill Bridge Co. *vs.* Commissioners, 103 Mass., 120, which was a case of the taking of a bridge owned by a private corporation for a public highway, Mr. Justice Colt said: "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such *that the owner will be put to no risk or unreasonable delay.*"

16 Gray, 417, Talbot *vs.* Hudson, before cited: In a statute taking private property for public use, a provision for assessment of damages and payment of same, by warrant from

Governor, out of treasury of Commonwealth, is a sufficient provision for compensation, as the Commonwealth is not liable to be sued.

Page 431: "This (the provision for payment out of treasury by warrant) is clearly an appropriation of so much money as may become necessary to pay the damages which may be assessed under the act. The provision could not be more explicit or definite as to the amount appropriated. * * * That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth made in the most solemn and authentic manner for the payment of the damages as soon as they are ascertained and liquidated by due process of law. * * * The answer to the argument that no process is provided by which payment can be secured and enforced is that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the Governor upon the public treasury. We are bound to presume the chief magistrate of the State will perform his duty," &c.

In Cherokee Nation *vs.* Kansas Ry. Co., 135 U. S., 659, the court said: "The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, *certain* and *adequate* provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty."

The extended litigation between the Great Falls Manufacturing Company and the United States Government, reported in 25 Federal Reporter, 521, 112 U. S., 645, and 124 U. S., 581, is full of this subject.

The first case, in the United States Circuit Court, was a motion for a preliminary injunction to restrain the Attorney-General and Secretary of War from condemning property,

because the act made no provision by which reasonable compensation for property taken for public use under the Constitution could be constitutionally and lawfully adjusted and determined. The act did provide for the appointment of three viewers as appraisers to value the land and report the same to the Attorney-General, and that in case of the valuation being declined, the person injured might within one year file a petition in the Court of Claims setting forth his right and the amount claimed, and that the court should hear and adjudicate such claims in the same manner as other claims against the United States were directed to be heard and adjudicated, and it provided *that judgment in favor of said claimants should be paid as other judgments of the said court are now directed to be paid.*

The court denied the application for a preliminary injunction and held that the provision of the act, providing for a petition to the Court of Claims for judgment against the United States, was a sufficient and constitutional provision for the ascertainment of the compensation to be paid to the property owner. See this question considered, 25 Fed. Rep., pages 529 to 531.

The court said (page 530): "Without, therefore, undertaking to sanction any rule by which, in general, property may be taken into possession without compensation first being made, even when not expressly forbidden by constitutional or legislative provision, it does seem to us that this is a case in which we should decline to interfere by injunction at this time, if the means provided by the act of Congress to ascertain the amount of compensation are adequate and proper, and the payment of the amount, when ascertained, reasonably provided for and assured.

"The only remaining question, then, is as to the provision of the act of Congress, that the "judgment of the Court of Claims in favor of the claimants shall be paid as other judgments of said court are now directed to be paid;" that is to say, the judgment may be paid out of any appropriation made by Congress for the payment of such claims as have been established by that court. It is urged that after the judgment

of the Court of Claims has been obtained, the failure of Congress to pass a law appropriating money to pay the judgment would defeat the complainant's efforts to get payment for its property. This is true. But it is also true that Congress always has heretofore appropriated the money required to pay the judgments of the Court of Claims; and as it has specially designated that court as the tribunal to ascertain what amount shall be paid to the complainant, nothing but a flagrant breach of good faith could delay the payment. The possibility of such action on the part of Congress, under all the circumstances of this case, we do not think sufficient to justify the issuing of a preliminary injunction. If the complainant is so advised this cause may be continued, so that hereafter, if it should indeed prove to be true, that a certain and adequate provision has not been made for payment of the amount which shall be ascertained to be due to the complainant, the further action of this court may be invoked.

"The application for a preliminary injunction is denied."

The Manufacturing Company then went into the Court of Claims and obtained a judgment for $15,692. 16 Ct. Cl., 160.

The case in 112 U. S. was an appeal by the United States from this judgment.

It was held, that where property is taken by the United States pursuant to act of Congress, as private property, for the public use, the Government is under an implied obligation to make just compensation to the owner; that the owner's claim for compensation in such a case is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the Court of Claims; and that where the owner *elected* to regard the action of the Government as a taking under eminent domain, although no formal proceedings to condemn had been originated, he might demand compensation for the property in the Court of Claims.

It will be seen by reference to the opinion of Mr. Justice Harlan, page 656, that the court proceeded wholly upon the fact that the property owner had voluntarily gone into the Court of Claims, there having been no formal proceedings to condemn the prop-

erty without further contesting the application for an injunction in which he had failed in the court below.

The court said: "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution—*upon which question we express no opinion*—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl *vs.* United States, 91 U. S., 367, 374."

And see, in this same connection, the case of Langford *vs.* United States, 101 U. S., 341, which, however, the court distinguished.

In 124 U. S., another act of Congress having been passed providing for the acquisition of further property and water rights, the court considered the same question (see page 598); that is, the contention that the act was unconstitutional and void, because it made no provision by which compensation for property taken under it could be constitutionally adjusted and determined, and because it compelled the plaintiff to have recourse to the Court of Claims.

The court said: These are questions of much interest, and their examination, in the light of authorities, might not be altogether unprofitable. But this opinion need not be extended for the purpose of such an examination, for the questions propounded are not material in the determination of the present case. *They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims.* * * * The plaintiff, by adopting that mode, has assented to the taking of its property by the Government for public use, and has agreed to submit the question of the determination of compensation to the tribunal named by Congress. By the very act of suing in the Court of Claims, it has not only waived the right, if such right it had, to

compensation in advance of the taking of its property, but the right, if such it had, to demand that the amount of compensation be determined by a jury. By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States, but must await an appropriation for its payment. When it resorted to that court it knew that its judgment against the United States could only be paid out of money appropriated for that purpose by Congress. *In short, the plaintiff has voluntarily accepted the provisions of the act of Congress in respect to the mode of ascertaining the compensation to be made to it.*"

See, as to jurisdiction of Court of Claims, U. S. Rev. Stat., section 1059, page 195.

And as to payment of judgments, section 1089, that the sum, one by final judgment, shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims.

And the acts of March 3d, 1887, Supp. to Rev. Stat., vol. I., page 559, and September 30th, 1890, *Id.* (paragraph 4), page 811.

And see Gould & Tucker's Notes, page 356, and following.

In the present case, although the act of 1888 provides a method of ascertaining damages in cases of condemnation by the United States, there is no adequate fund provided for the payment thereof. Upon an ascertainment in the condemnation proceedings of the damage to the Electric Railway Company, it will have to await the pleasure of Congress before it could obtain payment.

No one will be bold enough to affirm that it is *certain* that provision for payment of the respondent's damages, in case of condemnation, will be, by Congress, made without unreasonable delay.

And it is to be remarked here that most of the cases upon this subject have been those of municipal corporations against which, upon the rendition of a judgment, process could issue for the collection thereof.

See *Re* Sedgeley Avenue, 88 Pa., 509.

In the case of the State or the General Government, against which no process of any kind can issue, the least that should be required is that an adequate fund shall be provided by appropriation at the time, from which the property owner can be paid. Otherwise he will be practically remediless.

And it is to be noted that in all the reported cases, except the Great Falls case, and in practice, for instance, the Philadelphia Mint site cases, an adequate appropriation has been made in the act of Congress, providing for the condemnation.

Whatever, however, may be concluded upon this subject, it is submitted that the proviso to the resolution of June 6th, 1894, renders the whole unconstitutional, nugatory and void.

That proviso is, "*That no obligation or liability upon the part of the Government shall be incurred under this resolution, or any expenditure made except out of the appropriation already made and to be made during the present session of this Congress.*"

This resolution is the foundation of this proceeding. It was passed to meet the previous decision of the court below, that under the act of March, 1893, there was no authority conferred upon Congress to acquire real estate. See 34 Weekly Notes Cases (Phila.), 550.

No other appropriations than those contained in the acts of 1893 and 1894 were made during the session of Congress referred to in the joint resolution.

The proviso in effect reads, "That no obligation or liability on the part of the Government shall be incurred or any expenditure made under this resolution."

There is no escape from this conclusion, and it is submitted that the proviso brings this case directly within the decision of this court in the case of United States *vs.* Manderson's Executors, 3 U. S. Appeals, 199.

The proviso in that case was, "That the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter."

There is no difference, in principle, between that case and this.

The provision that the damages for the taking of a property such as that of the Electric Railway Company shall not exceed an exhausted appropriation, and that there shall be no obligation or liability on the part of the Government in excess of that appropriation, is of precisely the character as a proviso that there shall be no liability whatever.

Wales, D. J., said in the Manderson case: "If the use for which it is proposed to take such property is not a public use, or if the owner of the property is not to be paid *an equivalent*, to be lawfully ascertained, for its loss, then no proceedings for condemnation can or should be allowed. The counsel for the Government do not dispute this proposition. * * * But they say that the questions of compensation, its amount, and the time and manner of its payment do not arise, and will be determined hereafter. * * * The act of March 3d, 1891, however, excludes any inference or implication that the twenty-three additional acres on Petty's Island are to be bought or paid for by the United States. This act, by its express terms, provides that the land needed for continuing the improvement of the harbor shall be acquired, if at all, on the condition that the title shall be vested in the United States without charge to the latter, and there is nothing to be found in the acts of 1888 which removes or qualifies that condition."

The learned judge continued, referring to the former proceedings, begun and prosecuted under the act of August 11th, 1888, wherein the sum of $300,000 was appropriated for acquiring title to the lands mentioned in that act: "In that case there was color of authority for the appointment of commissioners to assess damages, since, strictly speaking, it could not be known in advance that the assessment would not fall within the sum appropriated by Congress. * * * The petition now before the court prays that commissioners may be appointed to appraise the lands, and to assess the damages to be paid by the United States of America therefor, in face of the fact that Congress has declared, in the plainest language, that the United States was not to be liable for any charges in obtaining title to the property, and no other source is pointed out from which the owners could obtain redress."

The resolution of June 6th, 1894, is something more than a resolution merely appropriating an alleged inadequate sum for the payment of the damages for the taking of the part of the railway mentioned in the petition. There is an express statement therein of the intention of Congress, as strong as that in the Manderson case, that *no obligation or liability on the part of the Government shall be incurred under the resolution*, or any expenditure made except out of the then existing appropriation, and such appropriation as might be made during the same session of Congress. That session is ended, and both the appropriations made by it are wholly exhausted.

An act of the State legislature, divesting one person of his property and vesting it in another *at a fixed compensation*, is unconstitutional and void.

Vanhorne *vs.* Dorrance, 2 Dallas, *304; see pages *312–*316.

In Commth. *vs.* P. & C. R. Rd., 58 Pa., 26, the act of August 19th, 1864, limited the recovery of damages to the expenditures made for the work on the line of the railway. The court said, page 50: "These provisions are altogether insufficient, illusory and unconstitutional. There is no direction whatever for a valuation of the corporate franchises and privileges attempted to be resumed for the public use. Even in regard to the actual tangible property taken—the lines of railway—the rule of valuation and appraisement is inadequate and unjust. It would be no just compensation to an individual to pay him for his land and improvements merely what they had cost him. Their value may have been double in the lapse of time and by the change of circumstances."

In Cunningham *vs.* Campbell, 33 Ga., 625, a case arising under the Constitution of the Confederate States and an act of their Congress, and in which the subject was well considered at length, it was held that a scheme provided for assessing compensation for impressed property, which fixed a value in a certain way, did not afford just compensation.

Rich *vs.* Chicago, 59 Ill., 286, holds that the determination of what is "just compensation" for private property when taken for public use, is a judicial act, which can properly be performed only by the judicial department of the Government.

In Pa. R. Rd. *vs.* B. & O. R. Rd. Co., 60 Md., 263, an act provided that all railroads crossing or connecting with another railroad, should permit the road so crossing or connecting to use their track or roadway for the passage of trains, at a fixed rate of tolls. It was held that even if such crossing and use of the other railroad could be effected against the consent of the company owning it, under the right of eminent domain, just compensation therefor must be paid, and that the legislature in exercising such a right cannot, in the law itself, fix the compensation to be paid.

See this case also in 14 A. & E. R. Rd. Cases, 79.

See also 127 Mass. 50, Conn., R. R. Co. *vs.* Commissioners, where it was held that a statute authorizing the manager of a railroad owned by the Commonwealth to take land for a passenger station, which provided no other mode of compensation to the owner of the land than that the same should be paid for from the earnings of the railroad, was unconstitutional, even if such earnings would probably have been sufficient to meet all claims for land damages.

In Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420, McLean, J., said, page 571: "In granting the charter of the Warren Bridge, the legislature seem to recognize the fact that they were about to appropriate the property of the complainants for public uses, as they provide that the new company shall pay annually to the college, in behalf of the old one, £100. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do—assess the amount of compensation to which the complainants are entitled. Here, then, is a law which not only takes away the property of the complainants, but provides, to some extent, for their indemnity. Whether the complainants have availed themselves of this provision or not does not appear, nor is it very material. The law, in this respect, does not bind them, and they are entitled to an adequate compensation for the property taken."

In Monongahela Navigation Co. *vs.* U. S., 148 U. S., 327, the language of Mr. Justice McLean in Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420, is quoted and the cases in

58 Penna., 26; 60 Md., 263, and 36 Miss., 300, are cited with approval.

The statute of the United States considered in the case of Shoemaker *vs.* U. S., 147 U. S., 282, simply made an appropriation of $1,200,000 to pay the cost of lands taken and also expenses incidental thereto. The court said, page 302: "The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. *But a glance at the act shows that the property owners are not affected by the limitation.* The value of the lands is to be agreed upon, or, in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress not to go beyond a certain aggregate expenditure cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to."

The resolution of 1894 is, however, a very different thing. It expressly limits the *liability* on the part of the Government to the appropriations *during the then present* (*now ended*) *session of Congress.*

3.

Whether any Act of Congress has Authorized the Acquisition of a Railway in Actual Operation.

The third, fourth and fifth exceptions (Transcript of Record, page 22) refer to this subject.

They are:—

III. Because it appears by the answer of the Gettysburg Electric Railway Company to the said petition, that the Gettysburg Electric Railway Company is a corporation of the

State of Pennsylvania, formed by articles of association on July 28th, 1891, under the act of Assembly providing for the incorporation and government of street railway companies, approved May 14th, 1889, for the construction of a railway from a point in Gettysburg, Adams County, Pennsylvania, upon and along certain highways to the borough limits, and that under and in accordance with the provisions of the said act certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for the recording of deeds in and for the county of Adams, in Deed-book S. S., folio 192. And because it so appears that the tract of land particularly mentioned in the fifth paragraph of said petition, belonging to the said Electric Railway Company, was acquired by various deeds of conveyance as a part of the right of way of one of the said branches or extensions, and that, in point of fact, the said tract of land sought to be condemned, which is a long, narrow strip over six thousand feet in length, is an integral part of the right of way of one of the said branches or extensions and of the franchise of said Electric Railway Company, the effect of the condemnation of which will be to cut the said branch in two, destroy its continuity and prevent its further operation.

Neither the act of Congress approved August 1st, 1888, nor the act approved March 3d, 1893, nor the joint resolution approved June 6th, 1894, was intended to authorize the Secretary of War to procure for the United States by condemnation any land which had been already devoted to a public use.

IV. The said petition does not show any authority in the Secretary of War warranting the condemnation of a part of the railway and franchises of the Gettysburg Electric Railway Company.

V. Because it appears by the answer of the said Electric Railway Company that the tract of land mentioned in the petition is a part of the railway of the said company, actually constructed before the passage of the joint resolution of June 6th, 1894, and then in full operation. If the said joint resolution can be taken as intending to authorize the acquisition by con-

demnation of any part of the right of way of the said Electric Railway Company, it shows by its terms that it was intended to refer only to the acquisition of that part of the right of way of the said company upon which it was proposed to construct thereafter such portion of its railway as had been theretofore unconstructed.

The property sought to be condemned is part of a passenger railway, necessary to the existence and enjoyment of the franchise. Neither the act approved August 1st, 1888, nor that of March 3d, 1893, nor the joint resolution of June 6th, 1894, authorizes the acquisition of that kind of property.

Of course property already devoted to public use *may* be condemned, and the property and franchises of a corporation are equally liable with the property of a private person to be taken for public use. We did not assert to the contrary. There is no question of the power of the sovereign, but there is always in such cases, a question of the *intention* of the State to take such property.

The law is settled that only an intention in express terms or shown to exist by necessary implication, will sustain the taking of property already devoted to a public use. General terms such as "land," &c., are not sufficient.

In West River Bridge Co. *vs.* Dix, 6 Howd., 537, Justice Woodbury said, page 543, that the right to take a franchise was subject to the limitation "that it must be in cases where a clear intent is manifested in the laws, that one corporation and its uses shall yield to another, or another public use under the supposed superiority of the latter and the necessity of the case."

It must be admitted that in the act of 1893 there is no expression of an intent to take this railway, or any part of it.

The Government knew of the situation when the act of 1893 was passed. This company had acquired this strip for the purpose of constructing its railway in 1891. The deeds were recorded in February and November, 1892. The United States could have taken the railroad, but it then said nothing on the subject.

It is well settled that general laws or general words will not authorize the condemnation of property already devoted to a public use.

The following cases:—

118 Mass., 391, Housatonic R. R. *vs.* Del. & Hudson;
124 Mass., 368, Bost. & M. R. R. *vs.* L. & L. R. R.;
53 N. Y., 574, *Re* B. & Alb. R. R. Co.;
79 N. Y.. 64, *Re* Bos. & H. T. & W. Ry. Co.;
35 N. J. (Law), 8, State *vs.* Montclair Ry. Co.;
39 N. J. (Law), 28, N. J. So. R. R. *vs.* Commrs.;
23 Minn., 167, Milwaukee & St. P. R. R. *vs.* Farbault;
8 N. H., 398, Barber *vs.* Andover;
15 Vert., 745, Armington *vs.* Township;

87 Pa., 307, Cake *vs.* R. R., where it was held that the word "property" in an act authorizing a railroad company to take property, did not include public highways.

93 Pa., 150, Penna. R. R. Appeal, where it was said that although a franchise is property, and as such may be taken by a corporation having the right of eminent domain, yet in favor of such right there is no implication, unless it arise from a necessity so absolute, that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control, and not a necessity created by the corporation itself for its own convenience or for the sake of economy.

8 Fed., Rep. 858, L. S. & M. S. Ry. Co. *vs.* N. Y. C. & St. L. Ry., see Judge McKennan's opinion;
128 Pa., 621, Groff's Appeal,

are all instances of this principle.

In U. S. *vs.* Monongahela Nav. Co., 148 U. S., 312, the Act of Congress provided in terms for the condemnation of "lock and dam No. 7" of the Navigation Company.

This question is to be determined solely by the terms of the resolution of June 6th, 1894.

The point made upon the first petition of the United States was, that the act of March 3d, 1893, did not expressly or impliedly authorize the Secretary of War to procure *any real estate of any kind* upon the battlefield of Gettysburg, and so

it was held. See U. S. *vs.* Tract of land in Cumberland Township, &c., 34 W. Notes C. (Phila.), 550.

The resolution of June 6th, 1894, was passed to cure this defect, and unquestionably it did provide, that the Secretary of War may acquire real estate upon the battlefield of Gettysburg. The question, however, is, whether the terms used in that act were intended to include, and do include, a section of a railway in actual operation; property already devoted to a public use.

The words of the resolution are: "Such *lands* or *interest in lands* upon or in the vicinity of said battlefield, as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3d, 1893." These words themselves are not sufficient.

They do not show any express or implied intent to take a part of the railway of the Electric Railway Company, *certainly not to take any part of that railway, which has been constructed and which is in actual operation*, and the strongest argument on the subject of the intention of Congress can be drawn from the failure of this joint resolution to say in express terms, that the part of the railway in question was to be acquired or condemned, because it was passed in view of the preceding litigation, which it expressly recites, and with a knowledge of the existing condition of things.

The argument of the other side is, that one of the "Whereases" in the preamble to the resolution of 1894, referred to a portion of the battlefield, which *might* be defaced by the *construction* of a railway, and that therefore the act intended that a part of the battlefield already defaced (as alleged) by a railway already constructed, might be taken.

It is a principle in the construction of statutes, that a preamble is no part of a statute, and that where the meaning of the enacting clause is clear and free from ambiguity, the preamble is not to be considered for the purpose of restricting or extending the terms of the enacting clause.

26 Pa., 288, Erie & N. E. R. Rd. *vs.* Casey.

We submit that an implication of intention must be found in the act or resolution itself, and not in the application of the act or resolution to the object of it.

If the intention of the law maker is to be sought, and it is said to be implied, the subsequent acts of another body, such as the Battlefield Commission, cannot supply the basis of an implied intent. Subsequent matter may sometimes show that an act as passed cannot be carried out; that its object cannot be accomplished, as was supposed. It does not follow in such a case, that all obstacles are to be disregarded because they were not known, and because without disregarding them the act cannot be carried into effect.

If an act gives no power to acquire property already devoted to a public use, and it is found that it would be necessary to acquire such property to effectuate the act, it will not be implied that Congress intended such property to be acquired. The act will fail until Congress is informed of the situation, and says that it did intend to take such property.

That an implication of power does not arise out of the circumstances of each particular case subsequently arising or appearing, but that the place where implied power is to be looked for is in the statute itself, is borne out by the Pennsylvania cases of—

93 Pa., 150, Pa. R. Rd. Co.'s Appeal;
115 Pa., 514 Pa. R. Rd. Co.'s Appeal;
122 Pa., 511, Appeal Pittsbgh. J. R. Rd. Co.;
134 Pa., 150, Groff's Appeal;
1 Montg. Law Rep., 129, Appeal of P. G. & N. R. Rd. Co.

We find, however, that the fourth paragraph of the preamble states, "whereas there is imminent danger that portions of said battlefield *may be* irreparably defaced by the *construction of the railway over the same*, thereby making impracticable the execution of the provisions of the act of March 3d, 1893, therefore be it resolved," &c.

The only reference to the electric railway is to that portion of it which has not yet been constructed, and to the supposed effect which the construction of that part of it may have, and it is a matter of interest, that this construction is borne out by the discussion which took place when the resolution was before the Senate.

In the proceedings of Thursday, May 31st, 1894, Senator Hill, who had charge of the resolution, said: "There is a certain trolley railroad company *trying to put down a railroad, through the very land which the United States wishes to acquire for the purpose desired.*"

And upon Saturday, June 2d, Senator Manderson said: "This trolley line * * * *proposes to enter, since the decision of the court,* upon the most material portions of this field, and practically destroy that which stands as nature's monument. I do not see how the injury which will be inflicted on the Gettysburg battlefield can be restored, *if the corporation is allowed to go on.*"

The entire discussion showed conclusively that the resolution was aimed at an acquisition of such parts of the right of way of the Electric Railway Company, as had not been at that time actually used for the construction and operation of the railway. The answer to the petition shows that there is a part of this railway not yet constructed, that is, the part extending over the field of the first day's battle.

We repeat, however, that the enacting part of the resolution itself uses the general words only, "lands or interest in lands." These words are not more extensive than the words "property" and "real estate," which in the cases above cited have uniformly been held to be insufficient to include property already devoted to a public use.

4.

Whether under the Legislation in this matter a part only of a Railway Franchise can be Condemned and Taken.

The exception referring to this subject is (Transcript of Record, page 23):—

VI. If the acts of Congress and the joint resolution mentioned in the said petition were intended to authorize the acquisition by condemnation of a railway and the franchises connected therewith, they will not be taken to authorize the appropriation of a part only thereof. The right of way upon which the

railway of the respondent has been constructed and the franchise of operating the same is a unit and is not capable of subdivision and partial appropriation.

The tract of land sought to be condemned is a part of the railway right of way and franchise of the Electric Railway Company.

A part only of a franchise cannot be condemned and taken. A franchise is indivisible.

A railroad is an entire thing, not legally subject to coercive severance or dissolution.

E. & P. R. R. Co. *vs.* Elizabethtown, 12 Bush (Ky.), 238.

The three components of a railroad, the roadbed, franchises and superstructure, are so essentially intermingled, and each so indispensable to the value of the others, that we do not see how they can be separately estimated.

L. R. Rd. Co. *vs.* Bate, 12 Lea, 573.

It would be almost as easy and as reasonable to divide a house or a locomotive into portions and assess each portion separately as to divide a railroad into portions and assess each portion of it separately. A portion of a railroad running through one township only would be worth but little, if anything, while that same portion, in connection with the balance of the road, might be invaluable.

Gulf R. R. Co. *vs.* Morris, 7 Kansas, 222.

In determining the value of a railroad the question is neither one of original cost nor of the intrinsic value of the various items of which it and its equipment are composed, taken separately, but what it is worth with all its capabilities and facilities as a railroad. The franchise extends to the entire corporate property, and it is not possible that it can be divided.

Porter *vs.* R. R. I. & St. L. R. R. Co., 76 Ill., 584.

The road, with its right of way, embankments, excavations, iron rails, switches, depots, engine houses, machine shops, &c., is, in a certain sense, an entirety, extending from one terminus to the other. * * * The extent of the line situated in any one city or town * * * is valued chiefly

by reason of its connection with the whole line. The value in each taxing district, without reference to the whole line, would be little more than the value of the iron rails for the purposes of removal.

City of Dubuque *vs.* C. D. and M. R. Co., 47 Iowa, 202.

A railroad and its equipment must be regarded for most, if not all, purposes as a unit, or as constituting a single entire property.

Stein *vs.* Mayor of Mobile, 17 Ala., N. S., 240;
People, *ex rel.* O. R. R. Co. *vs.* Pond, 13 Abb., N. C., 1;
People, *ex rel.* Buffalo R. R. Co. *vs.* Barker, 48 N. Y., 70;
People, *ex rel.* Buffalo R. R. Co. *vs.* Fredericks, 48 Barb., 173;
State *vs.* Southwestern R. R. Co., 70 Ga., 33;
V. & T. R. R. Co. *vs.* Washington Co., 30 Gratt., 480;
Georgia *vs.* A. & G. R. R. Co., 3 Wood (U. S.), 438;
Law *et al. vs.* People, 87 Ill., 412.

The property and franchises of a corporation cannot be sold piecemeal under executions.

2 Pitts. L. J., N. S., 101, Graham's Exec. *vs.* P. & O. Canal Co.;
72 Pa., 453, Bayard's Appeal;
11 W. N. C., 309, Longstreth *vs.* R. R.;
122 Pa., 306, Commth. *vs.* S. & Del. R. R.

Lands necessary for the enjoyment and exercise of a corporate franchise are parts of it and cannot be levied on apart from it.

Plymouth R. R. *vs.* Colwell, 39 Pa., 337;
Shamokin V. R. R. *vs.* Livermore, 47 Pa., 465;

and the taxation cases—

Leh. C. & Nav. Co. *vs.* Northampton, 8 W. & S., 334;
R. R. *vs.* Berks Co., 6 Pa., 70.

5.

Reply to Brief for the United States.

The foregoing part of this argument was in type at the time of the receipt of the brief for the United States. We therefore submit a reply thereto under a separate heading.

The case, No. 629, was not submitted, as stated in United States brief, page 2, "on the exceptions of the railway company" alone. On the contrary, the order of June 19th, 1894, denying the motion to quash the petition, expressly provided that it was "without prejudice to *any* question thereby raised, and with leave to present the *same* questions for consideration of the court upon the coming in of the report of the jury to be appointed." (Record, page 15.)

Both cases were heard in the court below on all the questions involved.

Both cases came before the court upon the petitions and answers.

It was necessary to get some facts other than those stated in the petition upon the record.

It is proper practice to do so by a plea or answer.

Lewis, Em. Dom., section 390, and cases, note 1.

The petitioner may thereupon contest any preliminary points and have them settled before the question of damages is entered upon. *Ibid.*

If, however, he ask for a jury, it is upon the petition and answer, and the averments in the latter are to be taken as admitted.

No separate question is raised by the amendments to the answer. They did nothing more than to bring down to the date of hearing, facts stated in the original answer.

Thus in the original answer VI., it is stated that the balance of the first appropriation, as of June 9th, 1894, was only $9272.56. (Record, page 10.) The amended answer, filed February 20th, 1895, brought this down to that date, the balance under the act of 1893 being only $2882.17, and under 1894, $36,000. (Record, page 27.)

The secondly amended answer, filed March 20th, 1895, brought the same fact still further down, it being alleged that there was not then "any part of either of said appropriations which is available for the purpose of paying and discharging any judgment which may be recovered by the Gettysburg Electric Railway in this proceeding." (Record, page 28.)

Moreover, the appropriation act of August 18th, 1894, was passed after filing of the original answer and motion to quash and appointment of the jury, the latter being June 23d, 1894. If it has any bearing upon this case, and it is cited in the United States brief, page 5, it is proper to answer as to the appropriation therein made.

It is not accurate to state (United States brief, page 9) that the court below has given to the Constitution "an extremely narrow and restricted construction."

The construction is in accordance with the rule by which this case is to be governed, which has been given in the words of late cases dealing with the very subject. See *supra*, page 8.

The very decisions cited, McCulloch *vs.* Maryland, 4 Wheat., 316, and the Legal Tender Cases, 12 Wall., 533, agree with our argument.

One of the "great powers" given to Congress in article I., section 8, of the Constitution, must be found to be sufficient alone or in conjunction with others to embrace as a means appropriate or plainly adapted to its end, the marking of a battlefield.

There is really no difficulty about a statement of the law; the only question is, does this case come within the settled doctrine of this court?

The learned Attorney-General can scarcely be serious in citing the preamble to the Constitution as authority for investing Congress with power "to perform whatever duties it may owe to others, whether dependent upon contract or consideration of national honor and gratitude."

To attain the objects specified in the preamble, the Constitution was ordained and established.

Whether Congress has or has not a power must be found in the body of the instrument.

It is interesting to notice that the United States brief does not place the power to take respondent's land, to mark the Gettysburg battlefield, upon the ground set forth in the opinion

of the dissenting judge below, that to raise and support armies. The learned Attorney-General returns to the position taken in argument below and puts it upon the first paragraph of section 8, article I., giving Congress power "to lay and collect taxes, &c., to provide for the common defense and general welfare of the United States. See *supra*, pages 24 and 26, as to this clause and the difference between the power to tax and the power to take property by eminent domain.

It is quite true that there is some limit even to the taxing power.

Congress certainly should not exert the power to tax except for public purposes, and it may be conceded that any purpose for which Congress may exert the power of eminent domain, is a purpose enabling it to rightfully exert the power of taxation, but it does not at all follow, as seems to be argued, for it is not so stated in terms, that the converse is true—that Congress may condemn land for any purpose for which it may raise or disburse money. That would make the exertion of the taxing power the measure of the power to take by eminent domain. No case that we know of so holds.

The case cited, Cole *vs.* La Grange, 113 U. S., 1, is to the effect that the general grant of legislative power in the Constitution of a State does not authorize the legislature, in the exercise of the right of eminent domain, or the right of taxation, to take private property without the owner's consent for any but a public object. In speaking of the Constitution of Missouri, article 16, that no private property ought to be taken or applied to public use without just compensation, Mr. Justice Gray uses the language quoted upon page 11 of the United States brief. He was speaking of a limitation upon the power of taxation, that is, that it must be for public use and not to promote private ends. He did not mean, nor can any inference to the effect be drawn from the language, that the two powers were coextensive.

The next case cited, United States brief, page 11, Olcott *vs.* Supervisors, 16 Wall., 678, was of the same character. It is

entirely consistent with the doctrine that the power of taxation in Congress may be exerted for public purposes, for which it could not condemn land.

And to recur again to the distinction between the State and national governments, we repeat that the question of the latter to condemn land is not conclusively determined, as it is in the case of a State, by a determination that the use is a public one. Of course that must exist in both instances, but in the case of the General Government it must not only be shown that the use is a public one, but that it is such a public use as is committed to Congress to carry out in aid of some one or more of its expressly granted powers.

The case of a railroad is an apt illustration of the distinction as applied to the cases of State and United States power. Undoubtedly everywhere the taking of land for a railroad is a public use. A State may confer the power to take land upon a railroad company authorized to build a railroad within its limits, but Congress may not. It can only authorize a railroad company to take land in a State when the railroad is of the character of an interstate highway, and that is because there is no other power in Congress to which the matter may be referred, except the power to regulate commerce among the States.

The cases cited upon page 13 have no application. Of course it is not denied that if the purposes named in the act of 1893 are public uses, and they are within the power of Congress to take land, the necessity or expediency of exercising the power and the determination of what particular property is needed, are questions of a legislative character.

We have denied that the use here is a public use in the proper sense of the term. We have denied that every use or purpose of the Government itself is necessarily a public use. See *supra*.

But however that may be, it by no means solves the question, as seems to be taken for granted by the learned Attorney-General. He seems to contend that, indeed, is the only question. See United States brief, bottom page 25.

The case cited on page 14 of United States brief, appeal of Rees, 12 Atlantic Reporter, 427, was one arising under an act of the Legislature of Pennsylvania, authorizing the incorporation of companies for "the educating of the public by exhibiting artistic, mechanical, agricultural and horticultural products, and providing public instruction in the arts and sciences." Whatever may be the power of the Pennsylvania Legislature in such a case (and it is to be said that the examination of the question by the Master is very meagre), the decision is not an authority upon the subject of the power of the United States.

The quotation made on the same page from Cooley's Constitutional Limitations, page 655, is a part only of the whole quotation on the subject, which has been given *supra*, page 14. The learned author expressly repudiates the doctrine that a taking is to be considered for a public use whenever it may be affirmed that the public interest or welfare can be in some way promoted by the taking of private property.

The quotation from the same authority, page 600, that the legislature may expend money in assuming burdens "which rest entirely on considerations of honor, gratitude or charity," has no bearing upon a case of eminent domain.

Page 15, United States brief. We will concede that the Constitution contains rather an enumeration of the general subjects for the exercise of governmental power than a description of the exact nature and extent of the powers themselves or the mode of their exercise, though we know of no authority that has said the United States is "a Government of restricted scope," instead of "one of limited powers."

The question recurs which is really little discussed, and not at all precisely answered, what particular "governmental power" is referred to as the basis of the purposes specified in the act of 1893?

We do not understand Cherokee Nation *vs.* Kansas Ry., 135 U. S., 641 (see page 657), as deciding that when an act of Congress is passed stating particularly the objects for which

land is to be acquired, that the taking may be justified if some other object can be thought of, which would come within the powers of Congress, but granting this, what purpose other than those expressed in the act of 1893 can be thought of, and when any are found, to what power in Congress are they referable?

The learned counsel are driven to the position that the United States may take private property for a sentimental object, "to foster patriotic feeling as a means of promoting the general welfare;" but we have shown, that what Congress may decide to be conducive to the general welfare is not determinative of the right to take land.

The result of the argument upon the other side is to afford no rule, to set no limitation whatever upon the power of Congress. None is suggested, except its own determination.

We know of no case deciding that Congress may condemn land for the purpose of making a cemetery for soldiers who fell in a particular battle.

The Arlington case, U. S. *vs.* Lee, 106 U. S., 196, did not pass upon any such question.

The act of Congress, Revd. Stat., section 4878, provides for the burial in any national cemetery of all soldiers, sailors or marines dying in service or in a destitute condition after having been honorably discharged, or who served in the late war.

However that question may be resolved it is not decisive of this case, nor even applicable to it. This is not a case of the care of the sick or disabled soldier or sailor, nor does it involve any duty to his dead body. The land is taken here, not in the performance of any supposed national duty to the dead, but that it may "keep alive the martial spirit" in the living. The case is to be determined with reference to that object alone.

If any condemnation of land was made under the act of August 18th, 1890, for the marking and preservation of the fields of Chattanooga and Chickamauga, it certainly was made

without opposition. Ordinarily a land owner is glad of the appropriation of his land by the State.

No case can be produced of a contested condemnation, that is, where the right to take was denied and upheld.

The argument upon the other side throughout is based upon the error of assuming that because Congress may, or rather does expend money for pensions, to support hospitals and homes, to establish cemeteries and national monuments, contribute to world's fairs and the opening of foreign canals, which are assumed to be proper exercises of the taxing power, it may take the land of an individual for any purpose of the same general character.

The difference is forcibly shown by a citation made upon the other side (United States brief, page 23), where the case of Hillish *vs.* Catherman, 64 Pa., 154, is referred to. That was a case turning upon the goodness of an act of the Legislature of Pennsylvania appropriating money to repay subscriptions to bounties to soldiers. The act was sustained. The court said: "We cannot declare this act unconstitutional unless * * * we can deny that a tax law must be considered valid unless it be for a purpose in which the community has palpably no interest."

Do the learned counsel mean to affirm that an act of Congress taking private property is to be tested by this rule?

Little need be said in reply to the second head of the brief for the United States, more than has been covered under the third division of this argument.

There is, however, a pardonable error of statement upon pages 28–9. The specific property to be taken is *not* designated either in the act of 1893 or resolution of 1894. The first did not contemplate the acquisition of any land of any kind, and the second used only the general words, "lands or interest in lands." Congress first ordered the condemnation of any land upon June 6th, 1894, when the railway attempted to be taken was not only built, but had been in operation over its whole line for over a month.

It is amazing that under these circumstances the learned

Attorney-General should address this court by stating, upon page 29, that the question upon this head is "whether the United States Government * * * can be thwarted by a trolley railroad."

But the point is made that the Gettysburg Electric Railway Company is not a public corporation; that it has no franchise, and that the use to which it is devoted is merely a private one, and the Niagara Falls Railway case is referred to.

That case was very different, in that it was not built upon and as a part of any public highway, as is the case here.

The Gettysburg Electric Railway Company was incorporated under the general street passenger act of Pennsylvania of May 14th, 1889, P. L., 211, Purdon's Dig., Pa. (1894), page 1823, pl. 239, to construct and operate a street railway on any street or highway, upon which no track is laid or authorized under any existing charter.

This act has been sustained upon the ground that the construction of railways on streets is not really a new use, that is, outside the proper purpose for which streets have been originally dedicated to public use.

Taggart *vs.* Newport Ry. Co., 16 Rd. Id., 668;
Lockhart *vs.* Railway Co., 139 Pa., 419;
Rafferty *vs.* Central Tract. Co., 147 Pa., 579.

The case of Pa. R. Rd. *vs.* Montgomery Co. P. Ry. Co., 167 Pa., 62, drew a distinction between the occupation of streets in cities and of country roads, with reference to the rights of abutting owners, but it not only did not decide that a railway under the act could not be built upon a country road, but it expressly recognized the fact that hundreds of miles of such railways had been constructed, and held that their existence would be preserved.

The court said, page 72, referring to roads which had been built without the consent of the local authorities:—

"Such railways cannot now be torn up or enjoined either by the township officers or at the instance of land owners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money

has been permitted, it would be inequitable to correct at this time what was a mutual mistake under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside of municipal boundaries."

The consent of all the local authorities to the building of the Gettysburg Electric Railway was obtained. (Transcript record, page 9.)

The dictum of Williams, J., in Rahn township *vs.* Street Ry. Co., 167 Pa., 84, quoted in the United States brief, is not applicable here. This railway is, as the plan shows, mostly built upon the Emmittsburg Road. The part built *upon its own property* is not only not for a great distance, but it also comes within the principle of the exception noted by the learned judge, which, he states, may be properly made.

But until the State of Pennsylvania interferes to annul the charter of this company by due proceedings upon such ground, it is not open to attack by the United States.

16 S. & R., 140, Turnpike *vs.* McConaty;

56 Pa., 325, Railroad Company *vs.* Speer.

The charter of a company incorporated for public purposes cannot be declared void collaterally

We have already answered the objection made (United States brief, page 32) to a consideration of the question arising out of the allegation in the supplemental answers, that the appropriations made in the acts of 1893 and 1894 have been exhausted.

Proof in support of these answers was not necessary, for no replication was filed. The petitioner went on and asked for a jury as the record stood, on petition and answer. The petitioner therefore admitted all the averments of the latter.

The criticism of the proviso to the resolution of June, 1894, upon page 36 of the United States brief, has no soundness.

The authority in the resolution was to acquire by purchase or by condemnation, and the proviso was that no "obligation or *liability* on the part of the Government shall be incurred *under this resolution*, or *any expenditure* made, except," &c.

The learned Attorney-General says this applies only to the purchase of land.

This is simply assertion in the face of the words.

There is no attempt to answer the principle of the Manderson case and its application.

CHARLES HEEBNER,
THOMAS HART, JR.

DECEMBER, 1895.